

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APPELLANTS' BRIEF AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14,255

993

FILED

JAN 24 1958

Joseph W. Stewart
CLERK

GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION., LTD.,
et al.,
and

ROBERT CECILIA INVESTMENT CORPORATION,
Appellants,

v.

THEODORE BRITTON,
Deputy Commissioner,
District of Columbia Compensation District,
Bureau of Employees' Compensation,
and

VIOLA R. BOWMAN,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN A. BECK, ESQ.,

605 Southern Building
Washington 5, D. C.

Attorney for Appellants

(i)

STATEMENT OF QUESTIONS PRESENTED ON APPEAL

1. Does the record as a whole support the Deputy Commissioner's finding that the employee suffered an accidental injury arising out of and in the course of employment?
2. The Deputy Commissioner's rejection of a portion of the appellants' evidence was arbitrary.
3. Did the trial court err in affirming the action of the Deputy Commissioner and not remanding the case for further proceedings to determine if there was any basis for rejecting part of appellants' evidence?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,255

GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION., LTD.,
et al.,
and

ROBERT CECILIA INVESTMENT CORPORATION,
Appellants,

v.

THEODORE BRITTON,
Deputy Commissioner,
District of Columbia Compensation District,
Bureau of Employees' Compensation,
and

VIOLA R. BOWMAN,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

This is an appeal by the appellants from an order entered on October 4, 1957, by the United States District Court for the District of Columbia denying appellants' motion for summary judgment or in the alternative to remand the case to the Deputy Commissioner for further proceedings and granting the appellees' motion for summary

judgment and dismissing the appellants' complaint to review the order of the Deputy Commissioner for the District of Columbia.

This court has jurisdiction of this appeal under Title 36, Section 501, District of Columbia Code, 1951, which makes applicable to the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq.

STATEMENT OF CASE

On November 23, 1956, appellee Viola R. Bowman was employed by appellant Robert Cecilia Investment Corporation as the resident manager of its apartment house located at 1314 Massachusetts Avenue, N. W., Washington, D. C. Mrs. Bowman was furnished an apartment by her employer and was subject to twenty-four-hour call, seven days a week. The duties of Mrs. Bowman included supervision of the apartment telephone switchboard to see that it was in operation at all times. When the regular operators did not report for work on time or were absent, Mrs. Bowman would substitute for them on the switchboard.

On November 23, 1956, at approximately 6:30 a.m., Mrs. Bowman was alone in her apartment. She awoke a few minutes after 6:00 a.m. and arose from her bed at approximately 6:30 a.m. (J.A. 16, 17) Shortly after arising from her bed, Mrs. Bowman fell to the floor and suffered trauma, including intra-capsular fracture of the right hip. She was discovered by a maid who came to her apartment at approximately 9:00 a.m. and helped her into bed. (J.A. 21). She remained in bed until approximately 4:00 p.m., when she called her physician and was subsequently removed to the hospital.

There was a conflict in the testimony and evidence as to Mrs. Bowman's activities between the time she arose from bed and fell to the floor suffering her injury. There was also a conflict in the

evidence as to where she fell to the floor. Mrs. Bowman was unable to state whether she slipped and fell to the floor or whether she lost consciousness and then fell to the floor. (J. A. 20)

The Deputy Commissioner held a hearing in this matter on June 7, 1957, and on June 27, 1957, filed his award and findings, which is quoted in part as follows:

"Mrs. Bowman arose at approximately 6:30 a. m. and after partially dressing herself started toward the telephone on her desk in the hallway of the apartment she occupied in the said employer's apartment house for the purpose of ascertaining whether or not the regular telephone switchboard operators were properly relieving each other and keeping the switchboard in continuous operation; that as she reached the desk she missed her footing and fell, suffering trauma including intra-capsular fracture of the right hip; that the claimant was performing a regular duty of the employment at the time of the injury; that the injury arose out of and in the course of the employment; " (J. A. 4).

On July 17, 1957, a complaint was filed in the United States District Court for the District of Columbia to review and set aside the above award of the Deputy Commissioner (J. A. 1). Thereafter on October 4, 1957, the appellees' motion for summary judgment was granted; appellants' motion for summary judgment or in the alternative to remand the case for further proceedings was denied and the complaint was dismissed. (J. A. 8)

This appeal is taken from the order of the United States District Court for the District of Columbia of October 4, 1957.

STATUTES INVOLVED

Title 36, Section 501, District of Columbia Code, 1951, 33 U.S.C. 901, et seq.

STATEMENT OF POINTS

1. The record as a whole does not support the finding of the Deputy Commissioner that the employee suffered an accidental injury arising out of and in the course of her employment.

2. The Deputy Commissioner's refusal to consider the signed statement of appellee Viola R. Bowman in making his findings was arbitrary.

3. The order of the trial court was founded on Scott v. Hoage, 63 App. D.C. 391, 73 F. (2d) 114, and was erroneous as a matter of law.

SUMMARY OF ARGUMENT

I

The injuries suffered by Viola R. Bowman did not arise out of and was not the result of a danger incidental to her employment.

II

The Deputy Commissioner should have given consideration and weight to the statement made by Mrs. Bowman and her physician shortly following the injury. His refusal to do so was arbitrary.

III

The trial court, in effect, erroneously held that any injury suffered by a resident employee while on the premises of his employer arises out of the employment as a matter of law.

ARGUMENT

I

Mrs. Bowman described her apartment as being on the second floor. The front door of the apartment opened into a hallway which contained a desk and was used as her office. A door led from the hallway into her bedroom. A doorway also connected her bedroom with the bathroom. The apartment was made available to Mrs. Bowman in an unfurnished condition. There was a desk in the hallway with the telephone placed on it. The floor in the bedroom was of parquet wooden construction, in an unwaxed condition and was not covered by carpet or rug (J.A. 15, 16).

Mrs. Bowman had received no calls on the evening of November 22, 1956. On the morning of November 23, 1956, she awoke without the use of an alarm clock sometime between 6:00 and 6:30 a.m. She did not get out of bed immediately but remained in bed approximately five minutes after awakening. She was sleeping in a nightgown, and at the time of leaving her bed, she put on her house slippers and started to the bathroom. The bathroom door was approximately 10 feet from her bed. (J.A. 16, 17).

At the time of the hearing before the Deputy Commissioner, Mrs. Bowman testified that upon arising she went into the bathroom, partially dressed herself, combed her hair, left the bathroom and went into the hallway of the apartment. As she entered the hallway, she blacked out and fell to the floor. (J.A. 18) She did not know whether she fell before losing consciousness or was rendered unconscious by her fall. (JA. 20) She had a subconscious recollection of picking up the telephone but not speaking into it. She was unable to estimate the approximate time that she was unconscious. When she regained consciousness, the telephone was on the floor beside her, and she requested the operator to send for help. The maid came to her apartment at approximately 9:00 a.m. and helped her into bed.

She was removed to the hospital later the same day. (J. A. 20, 21).

Mrs. Bowman testified that when the receiver was off the hook of the telephone in her apartment a light came on and a buzzer sounded at the switchboard downstairs. (J. A. 25) This was also confirmed by George T. Gray, Jr. and Dorothy Jean Harris, the switchboard operators. (J. A. 34, 38). Mr. Gray testified that he was the night switchboard operator at the apartment building and was on duty from 11:00 p. m. , November 22, to 7:00 a. m. , November 23, 1956. Mr. Gray did not notice any unusual activity at the switchboard with reference to Mrs. Bowman's apartment. He did not see a light on the switchboard from her apartment nor was there anything to lead him to believe that Mrs. Bowman's phone was off of the hook. He did not recall Mrs. Bowman calling him on the morning of her injury, before leaving the switchboard. (J. A. 34).

Miss Harris testified that she took over the switchboard at the apartment at approximately 7:10 a. m. on November 23, 1956. She thought that Mr. Gray was still present at the time she arrived. At the time of taking over the switchboard, the trunk line from Mrs. Bowman's apartment was buzzing and the light was on. She plugged in the trunk line to Mrs. Bowman's apartment and when she did not receive an answer, she sent the maid, Miss Dora Jane Gay, up to check on Mrs. Bowman. Miss Gay called her from Mrs. Bowman's apartment and advised her that Mrs. Bowman was injured. Miss Harris believed that this activity took only a few minutes following her arrival at the apartment house (J. A. 37, 38, 39).

Miss Dora Jane Gay testified that she was the maid at the apartment; and at the request of the switchboard operator, went upstairs and discovered Mrs. Bowman sometime after 9:00 a. m. on November 23, 1956. Mrs. Bowman was lying between the desk and the hallway, and the phone was off of the hook near her. (J. A. 40, 41).

Mr. Richard G. Freudig, an investigator for the appellant General Accident Fire and Life Assurance Corp., Ltd., testified that he visited Mrs. Bowman in the hospital approximately three or four days following her injury. He did not discuss the injury with her at that time because it was apparent that she was in a great deal of pain. He subsequently contacted Mrs. Bowman's husband and made a tentative appointment to meet Mr. and Mrs. Bowman on December 3 or 4, 1956. The appointment, however, was not kept until December 7, 1956, when Mr. Freudig picked up Mr. Bowman at his apartment and they drove to the hospital to interview Mrs. Bowman. At the time of the interview, Mr. Freudig described Mrs. Bowman as having full use of all of her faculties and cooperated with him. She recognized him from a claim which he had adjusted for her a year or so earlier. In the presence of Mr. Bowman, Mr. Freudig reduced to writing a narrative statement of the occurrence of the injury as related to him by Mrs. Bowman. The statement in its final form was submitted, read, and signed by both Mr. and Mrs. Bowman. (J.A. 41, 42, 43) A copy of the statement was introduced into evidence at the time of the hearing. This statement is quoted, as follows:

"I got out of bed this morning and started into the bathroom. I had on a pair of house slippers and my night clothes; I was on my way to the bathroom, was still in the bedroom when I suddenly slipped and fell heavily to the floor on my right side." (J.A. 46).

Mr. Bowman testified that neither he nor his wife read the above statement prior to signing it. (J.A. 30). Mrs. Bowman, however, stated that she read the statement prior to signing it but denied understanding its contents. (J.A. 21, 22, 23, 45) She denied making such a statement to Mr. Freudig and claimed that at the time of the interview she was under the influence of a lot of dope. (J.A. 24).

A report, dated December 17, 1956, signed by Mrs. Bowman's physician, Dr. Allen M. Ferry, was introduced into evidence at the hearing. Question No. 11 of said report and the answer thereto is quoted, as follows:

"11. State in Patient's own words how accident occurred or occupational disease was caused.

Answer: The patient slipped and fell going to the bathroom." (J.A. 47).

It is clearly apparent that the record in this case does not contain substantial evidence upon which to base a finding that Mrs. Bowman was performing a regular duty of her employment at the time of her injury and that the injury arose out of her employment. The signed statement of Mrs. Bowman, taken within two weeks of the occurrence of the injury, shows that she was going from her bed to the bathroom at the time of injuring herself. This version is further strengthened by the statement of Mrs. Bowman's own physician. Such an injury could not be said to have resulted from a danger incidental to Mrs. Bowman's employment. Ackerman v. Cardillo, 1944, 78 U.S. App. D.C. 310, 140 F. (2d) 348.

The fact that Mrs. Bowman was discovered by the maid lying near the desk with the telephone at her side, does not detract from the above statements. Mrs. Bowman testified that she called the switchboard operator to request assistance. It would, therefore, be logical that having used the telephone to seek help, Mrs. Bowman would be discovered by the maid to be near the telephone in the hallway.

There is no substantial evidence upon which the Deputy Commissioner could make a finding that as Mrs. Bowman reached the desk in the hallway, she missed her footing and fell. If the testimony of Mrs. Bowman is to be accepted in preference to her written statement, then the Deputy Commissioner's finding should be in accordance with it.

Mrs. Bowman testified that as she entered the hallway, she blacked out and fell to the floor. She did not know whether she fell before losing consciousness or was rendered unconscious by her fall. There was no testimony that she slipped or tripped over anything causing her to fall. The substantial testimony was to the effect that she lost consciousness and then fell to the floor.

II

The Deputy Commissioner's refusal to consider Mrs. Bowman's signed statement and the contents of her physician's report was arbitrary.

An investigation is essential to all cases of this nature. This investigative procedure requires the obtaining of statements from parties and witnesses to accumulate and preserve evidence. All precautions were exercised at the time of obtaining the statement in order to assure that Mrs. Bowman was fully competent to recite the facts of the occurrence of her injury. The investigator did not discuss the case with her on his first visit. At the time of obtaining the statement on his second visit, the investigator made certain that Mrs. Bowman was fully competent to give the statement by arranging for the presence of Mr. Bowman. There is no evidence that this procedure was improper in any respect.

The written statement and the report of Mrs. Bowman's physician clearly revealed her activities and the place where she suffered her injury. This evidence was obtained approximately two weeks following the injury. The facts of this case were much more vivid in her mind at the time of the statement and report, than at the time of giving her testimony before the Deputy Commissioner some seven months later.

The only basis upon which the Deputy Commissioner could reject the written statement of December 7, 1956, was Mrs. Bowman's statement that she was "under the influence of a lot of dope" at the time of giving the statement. There was no evidence from physicians or hospital records to substantiate her claim. At the time of the hearing of the motions for summary judgment in the Trial Court, counsel for appellants subpoenaed the records of the hospital where Mrs. Bowman was institutionalized on December 7, 1956. Counsel stated to the Court that he believed the records would show that Mrs. Bowman had not been administered any drugs which might effect her competency to give the written statement. The Trial Court refused to consider this offer of evidence.

It is respectfully submitted that this case should be remanded to the Deputy Commissioner for further proceedings to determine if there is, in fact, any reason for refusing to consider the written statement and medical report in arriving at his findings.

III

In ruling on the motions for summary judgment, the Trial Court stated that it was bound by the decision of Scott v. Hoage, (1934), 63 App. D. C. 391, 73 F. (2d) 114. That case involved a resident janitor who was furnished an apartment on his employer's premises. During the middle of the night the premises of the employer caught fire and the employee janitor was killed. The Court held that the living on the premises by the employee was an incident of the employment and since the death resulted from the employee being present on the premises at the time of the fire, it arose out of and in the course of employment.

The instant case is distinguishable from the situation passed on in the Scott case. In that case the death of the employee was the sole result of his being on the employer's premises at the time of the fire.

In the absence of his employment he would not have been on the premises and would not have been killed. Under such circumstances it is reasonable to infer that his death was incidental to and arose out of his employment.

In the instant case the employee's injury and the requirement that she live on her employer's premises are unrelated. The employee was either in the act of walking from her bed to the bathroom at the time she slipped and fell or she was walking from the bathroom to the telephone when she suddenly fell to the floor. Whether one accepts the version outlined in the employee's statement of December 7, 1956, or her testimony at the time of the hearing, it is clear that her presence in this particular apartment at this specific time did not, of itself, contribute to her injury. The Trial Court, therefore, should have gone beyond the requirements of Scott v. Hoage, supra, and considered whether her injury resulted from a danger incidental to her employment.

CONCLUSION

It is respectfully submitted that the findings of the Deputy Commissioner are not supported by substantial evidence and the Trial Court erred in overruling appellants' motion for summary judgment and granting appellees' motion for summary judgment.

Respectfully submitted,

JOHN A. BECK, ESQ.

605 Southern Building
Washington 5, D. C.
Attorney for Appellants.

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JOINT APPENDIX

1

[Filed July 17, 1957]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

GENERAL ACCIDENT FIRE & LIFE
ASSURANCE CORPORATION, LTD.,
425 - 13th Street, N. W.,
Washington, D. C.,

and

ROBERT CECILIA INVESTMENT COR-
PORATION,
1420 K Street, N. W.,
Washington, D. C.,

Plaintiffs

vs.

THEODORE BRITTON,
Deputy Commissioner,
District of Columbia Compensation District
Bureau of Employees' Compensation,
604 - 17th Street, N. W.,
Washington 25, D. C.,

and

VIOLA R. BOWMAN,
1514 17th Street, N. W.,
Washington, D. C.,

Defendants

Civil Action No. 1766-57

COMPLAINT FOR REVIEW OF COMPENSATION AWARD

1. Jurisdiction is vested in this Court by Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia by an act of Congress approved May 17, 1928.

2. The plaintiff, General Accident Fire & Life Assurance Corporation, Ltd., is a body corporate having an office and doing business in the District of Columbia. The plaintiff, Robert Cecilia Investment Corporation, is a Maryland corporation with offices at 1420 K Street, N. W., Washington, D. C.

3. The defendant, Theodore Britton, is a Deputy Commissioner, United States Employees' Compensation Commission, District of Columbia District.

4. On November 23, 1956, the defendant, Viola R. Bowman, was an employee of plaintiff, Robert Cecilia Investment Corporation, and was employed as a resident manager of the employer's apartment house located at 1314 Massachusetts Avenue, N. W., Washington, D.C. At the
2 time and place aforesaid, the plaintiff, General Accident Fire & Life Assurance Corporation, Ltd., insured the liability of the employer for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

5. On November 23, 1956, at approximately 6:30 a.m., while the defendant, Viola R. Bowman, was employed as aforesaid, she suffered an injury described as an intra-capsular fracture of the right hip. Said injury allegedly occurred a few minutes following the said defendant's arising from her bed and while she was preparing to telephone the apartment switchboard from her apartment to determine whether the switchboard was being supervised. A statement taken from the said defendant on December 7, 1956, and introduced into the record, indicated that the defendant was in fact on her way from her bed to the bathroom and slipped and suffered the above injury while still in the bedroom.

6. At a formal hearing held in this matter before defendant Theodore Britton on June 7, 1957, the testimony of several witnesses was taken and reports, statements and exhibits were received into evidence constituting the entire record upon which the Deputy Commissioner could make his decision and award.

7. Pursuant to the above hearing, the defendant, Theodore Britton, Deputy Commissioner, made a finding of fact and an award of compensation benefits to the defendant, Viola R. Bowman, dated the 27th day of June, 1957, a copy of which is attached hereto. Plaintiffs allege that said findings of fact and award are not supported by substantial evidence on the record considered as a whole, is not in accord with law, is arbitrary and is founded upon speculation.

WHEREFORE, the plaintiffs pray

1. That the original transcript of the testimony taken at the formal hearing on June 7, 1957, reports, statements and exhibits contained therein be filed in this cause and made a part of this complaint.

2. That the said Theodore Britton, Deputy Commissioner, be enjoined temporarily and permanently from enforcing or attempting to enforce the aforesaid award of compensation.

3. That this Honorable Court wholly suspend or set aside said award and dismiss the claim for compensation.

4. That plaintiffs have such other and further relief as is just.

FROST & TOWERS,

/s/ John A. Beck
Southern Building
Washington 5, D.C.
Attorneys for Plaintiffs.

4 [Filed July 17, 1957]

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the Matter of the claim for compensation :
under the District of Columbia Workmen's :
Compensation Act :

VIOLA R. BOWMAN :

Claimant :

vs. :

ROBERT CECILIA INVESTMENT COR-
PORATION (A Maryland Corporation) :

Employer :

GENERAL ACCIDENT FIRE AND LIFE
ASSURANCE CORPORATION, LTD. :

Insurance Carrier :

Compensation Order
Award of Compensation
Case No. 26121-1

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on November 23, 1956, the claimant above named was in the employ of the employer above named, whose address is c/o Jess Fisher and Company 1420 K Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the General Accident Fire and Life Assurance Corporation, Ltd.; that the employment of the claimant by the employer was as resident manager

5 of the employer's apartment house located at 1314 Massachusetts Avenue, Northwest, Washington, D. C.; that the work duties of the claimant in the employment required her to be on twenty-four-hour call seven days a week and included the duty of seeing to it that the apartment telephone switchboard was in operation at all times; that in the performance of the said duty it was necessary for the claimant to see to it that the regular telephone switchboard operators reported for work at stated times and to substitute for the operators who failed to report for work; that the claimant was frequently required to operate the said telephone switchboard due to tardiness and absences of regular operators; that the employer provided an apartment in the said apartment house for the claimant's occupancy so that she would be readily available for the performance of her continuous duties in the employment; that on the said day the claimant herein, in accordance with the daily requirement of the said duty, arose at approximately 6:30 a. m. and after partially dressing herself started toward the telephone on her desk in the hallway of the apartment she occupied in the said employer's apartment house for the purpose of ascertaining whether or not the regular telephone switchboard operators were properly relieving each other and keeping the switchboard in continuous operation; that as she reached the desk she missed her footing and fell, suffering trauma including intra-capsular fracture of the right hip; that the claimant was performing a regular duty of the employ-

ment at the time of the injury; that the injury arose out of and in the course of the employment; that written notice of injury was not given to

6 the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that as a result of the injury the claimant required medical and surgical treatment and care and her need for such treatment and care is continuing; that the employer, having knowledge of the injury, neglected to provide the claimant with the necessary treatment and care; that treatment and care required by the claimant as a result of the injury had been rendered by physicians and facilities of her own choice; that the employer and the insurance carrier are liable for the reasonable cost of all treatment and care required by the claimant as a result of the injury; that the average weekly wages of the claimant herein at the time of the injury were \$39.81; that as a result of the injury the claimant has been wholly disabled from November 23, 1956 to the present time and such disability is continuing; that for such temporary total disability the claimant is entitled to compensation at the rate of \$26.54 per week (66-2/3 per cent of \$39.81); that accrued compensation due the claimant for temporary total disability from November 23, 1956 to June 20, 1957, inclusive, 30 weeks at the rate of \$26.54 per week, amounts to \$796.20; that nothing has been paid to the claimant as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Robert Cecilia Investment Corporation, and the insurance carrier, General Accident Fire and Life Assurance Corporation, Ltd., shall pay to the claimant herein compensation as follows:

7 For temporary total disability, 30 weeks at the rate of \$26.54 per week, from November 23, 1956 to June 20, 1957, inclusive, in the amount of \$796.20, which amount is due and payable forthwith, and thereafter shall continue payments of compensation to the claimant for temporary total disability at the rate of \$26.54 per week, payable in biweekly installments during the continuance of such disability subject to the limitations

of the Act or until further order of the Deputy Commissioner.

The employer and the insurance carrier shall also pay the reasonable cost of all medical and surgical treatment and care required by the claimant as a result of the injury to this time and shall continue to furnish the claimant with such medical and surgical treatment and care as the nature of the injury or the process of recovery may require.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of Norman S. Bowles, Jr., Esq., in the amount of \$200, such sum to be a lien upon and paid out of this award.

Given under my hand at Washington, D. C.
this twenty-seventh day of June, 1957

/s/ Theodore Britton

Deputy Commissioner
District of Columbia Compensation District

8 [Certificate Of Service]

9 [Filed September 9, 1957]

**DEFENDANT BRITTON'S MOTION FOR SUMMARY
JUDGMENT**

Comes now defendant Britton by his attorney, the United States Attorney for the District of Columbia, and moves the Court to enter judgment for defendants on the ground that there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law.

Attached hereto and made a part hereof is a certified copy of the transcript of proceedings (with exhibits) before the Bureau of Employees' Compensation, Department of Labor, on June 7, 1957, in the Matter of Viola R. Bowman, Docket No. 26121-1

/s/ Edward P. Troxell
Principal Asst. United States Attorney

/s/ Dyer Justice Taylor
Assistant United States Attorney

/s/ Oliver Gasch
United States Attorney

/s/ E. Riley Casey
Assistant United States Attorney

Attorneys for Defendant Britton

10 **STUART ROTHMAN**
 Solicitor of Labor

WARD E. BOOTE
 Assistant Solicitor

HERBERT P. MILLER
JAMES EDWARD HUGHES
 Attorneys
 U. S. Department of Labor
 Of Counsel

27 [Filed September 19, 1957]

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
 FOR SUMMARY JUDGMENT**

Come now the plaintiffs by and through their attorneys, Frost & Towers, and oppose the motion for summary judgment filed herein on behalf of defendant Theodore Britton, Deputy Commissioner, and refer to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment filed herein.

FROST & TOWERS

/s/ John A. Beck

* * * *

Attorneys for Plaintiffs

28 [Certificate of Service]

29 [Filed September 19, 1957]

**PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT OR IN THE
 ALTERNATIVE TO REMAND CASE TO THE DEPUTY COMMISSIONER
 FOR FURTHER PROCEEDINGS**

Come now the plaintiffs by and through their attorneys, Frost & Towers, and move the Court to enter judgment for plaintiffs on the ground that there is no genuine issue as to any material fact, or in the alternative to remand the case to the Deputy Commissioner for further proceedings and for reasons, therefore, refers to the Memorandum of

Points and Authorities filed herein.

FROST & TOWERS

/s/ John A. Beck

* * * *

Attorneys for Plaintiffs

30 [Certificate Of Service]

38 [Filed October 4, 1957]

ORDER GRANTING SUMMARY JUDGMENT

This action came on to be heard upon the respective motions for summary judgment of plaintiffs and defendants, and the court having found that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law, it is this 4th day of October, 1957,

ORDERED that the motion of plaintiffs for summary judgment, or in the alternative to remand case to the deputy commissioner for further proceedings, be and the same hereby is denied, and it is further

ORDERED that the motion of defendant Britton for summary judgment be and the same hereby is granted, and that the action be and the same hereby is dismissed on the merits.

/s/ Alexander Holtzoff
Judge

No objection as to form:

Attorney for Plaintiffs

39 [Filed November 7, 1957]

NOTICE OF APPEAL

Notice is hereby given this 7th day of November, 1957, that plaintiffs, General Accident Fire & Life Assurance Corporation, Ltd. and Robert Cecilia Investment Corporation hereby appeals to the United

States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of October, 1957, in favor of Theodore Britton, Deputy Commissioner and Viola R. Bowman against said General Accident Fire & Life Assurance Corporation, Ltd. and Robert Cecilia Investment Corporation.

FROST & TOWERS

/s/ John A. Beck

* * *

Attorneys for Plaintiffs
General Accident Fire & Life
Assurance Corporation, Ltd.
Robert Cecilia Investment
Corp.

Please mail copies to:

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1 EXCERPTS FROM OFFICIAL REPORT OF PROCEEDINGS
 U. S. DEPARTMENT OF LABOR
 BUREAU OF EMPLOYEES' COMPENSATION
 DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT
 BEFORE THE HONORABLE THEODORE BRITTON
 Deputy Commissioner for the District of Columbia

----- :
 VIOLA R. BOWMAN :

Claimant :

vs. :

CASE NO. 26121-1

ROBERT CECILIA INVESTMENT CORPORA-
 TION (A Maryland Corporation)

Employer :

GENERAL ACCIDENT FIRE AND LIFE
 ASSURANCE CORPORATION, LTD.

Carrier. :

Pursuant to notice, this matter was heard before the Honorable Theodore Britton, Deputy Commissioner, Bureau of Employees' Compensation, U. S. Department of Labor, at Washington, D. C., on June 7, 1957, at 10 o'clock a. m.

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7 VIOLA R. BOWMAN

the claimant therein, was called as a witness for and on her own behalf, and having been then and there duly sworn by the Deputy Commissioner, assumed the witness stand and upon examination testified as follows:

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8 DIRECT EXAMINATION

BY MR. BOWLES:

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10 THE DEPUTY COMMISSIONER: For the record, the parties agree that the claimant was employed at the time of this injury by Robert Cecilia Investment Corporation, whose address is care of Jess Fisher Managing Company, 1420 K Street, Northwest, Washington, D. C.

Go ahead.

BY MR. BOWLES:

Q. And you say your duties were -- you were on duty 24 hours a day, is that correct? A. That is right.

Q. How many days a week? A. Seven days a week.

Q. You were subject to call at any time? A. That is right.

Q. You were furnished an apartment, is that correct? A. What?

Q. You were furnished an apartment? A. That is right.

Q. Was the apartment furnished, furniture and all, furnished by you, was it your furniture or -- A. (Interposing) My furniture.

Q. You were given an apartment? A. Yes.

* * * * *

11 Q. Now Mrs. Bowman, on or about the 23rd of November, in the early morning, will you tell us what occurred? A. Well, I got up, the usual time, between 6:00, 6:30, to get up to see if the switchboard was covered because I have to be on the switchboard in case anybody else isn't, and the only thing I know is what I always do, I go to the board immediately when I get up and get dressed and see if the board is going to be covered, and I know when I went to the hospital, I was fully dressed except my shoes and my dress.

Q. When you got up this morning, about what time was it, do you recall? A. Well, I'll say between 6:00 and 6:30.

Q. It is your usual habit to get up then? A. That is right.

Q. What did you usually do when you got up? A. When I first get up?

Q. Yes. A. Immediately go to the telephone -- after I go to the bathroom, I partly dress and go to the telephone.

Q. What did you do there? A. To call the nightman to see if he got notice the girl was coming in.

12 Q. Then what did you do? A. Go down and run the switchboard.

Q. Until she came in, or did you get a replacement? A. Yes.

Q. Concerning your employment around say 24 hours a day, was there any time after midnight when you were ever called to perform any

duties? A. I was called lots of times by the nightman. If any service was needed in the building, I was called and if anyone drunk was in there I had to call a policeman and have them thrown out.

Q. Getting back to the 23rd, you got up, you say 6:00 or 6:30 and went to the phone. What happened? A. What's that?

Q. What happened then? A. When?

Q. On the morning of the 23rd of November, 1956, when you got up to go to the phone, what happened to you? A. Well, I started to go in my office and I guess I blacked out.

Q. Did you have an office there? A. Well, a lobby, if you want to call it an office.

Q. And you maintained that in your apartment? A. Yes.

13 Q. In your apartment? A. That is right.

Q. And do you recall, did you black out or fall or what happened? Tell me as near as you can remember? A. I am trying to Mr. Bowles, but I went to the telephone and the first thing I knew I was on the floor and 'til the maid came I don't know what happened.

Q. How much later was it when the maid came? A. What?

Q. Do you know how much later it was? A. 9:00 o'clock.

Q. You were lying on the floor between 6:30 and 7:00 until 9:00 o'clock? A. That is right.

Q. And then what happened? A. Well, she picked me up and put me in a chair and put me to bed.

Q. And tell me, she put you in bed and what occurred after that? A. (Pause.)

Q. Did she take care of you, get anything for you? A. No, she gave me some coffee, and that is all that I know of.

Q. Did there come a time that you went to the hospital? A. That is right. When my husband came home he called a doctor, Dr.

14 Manganaro.

THE DEPUTY COMMISSIONER: Dr. Manganaro?

THE WITNESS: Yes, and he put me in the hospital.

BY MR. BOWLES:

Q. You then went to the hospital, that day? A. Yes.

Q. That evening? A. That is right.

Q. Do you know what time it was when you went to the hospital?

A. Well by the time the doctor got through and by the time the ambulance got there, I guess it was 9:00 o'clock.

Q. How long did you remain in the hospital, that particular hospital? A. Well, I wouldn't know, only whatever somebody says.

THE DEPUTY COMMISSIONER: We have that already.

THE WITNESS: But I have been in the nursing home too.

BY MR. BOWLES:

Q. What part of your body was injured, Mrs. Bowman? A. My right hip.

Q. Did you strike your head when you fell? A. No.

Q. No? A. No.

Q. Your right hip. Have you been able to walk since this injury occurred? A. Well no I haven't. I wouldn't be here in a stretcher if I could.

Q. You cannot walk? A. No.

Q. Can you move your legs all right? A. I can move my leg up and down, but that is all.

* * * * *

Q. When you first went to work for the Robert Cecilia Real Estate Company, your employer, was it your understanding at that time that you were on 24 hour duty? A. Yes.

* * * * *

16 CROSS EXAMINATION

BY MR. BECK:

* * * * *

18 Q. Or were you to act in a supervisory capacity? A. Resident Manager I was to act as.

* * * * *

Q. And he told you you had to be on 24 hour a day call? A. That's all managers, they have to do that.

Q. Did he tell you anything else concerning your duties? A. Well, after I got there he would tell me something every day, but I had to run the switchboard 21 hours a week and for 7 days a week I had to be on duty, no rest.

* * * * *

20 Q. Now, you say you were on 24 hour call and it was not unusual to be called in the middle of the night to have drunks put out, call the police and that sort of thing. Do you recall any other instances where you were called during the middle of the night to perform managerial duties? A. If somebody -- if the elevator got stuck, somebody got
21 caught in the elevator, I would have to take care of them.

Q. Did that actually occur? A. Yes.

Q. How many times? A. Oh, when that elevator was first turned into a self-service elevator, it was happening all the time.

* * * * *

Q. All right. Other than servicing calls concerning the elevator, were there any other instances when you were called out during the middle of the night? A. Yes. I had to put a person out one night because they hadn't paid their rent and they was -- he was -- the woman was living with another man and their things and everything was brought into the lobby.

Q. What time of night was that? A. About 2:00 o'clock in the morning.

* * * * *

22 Q. When was the first time that you learned that it was also part of your duty to maintain and care for the switchboard? A. When the employee's work commission -- I think is it -- got after him because they were working girls too long.

* * * * *

23 Q. Did someone from that agency come directly to you and tell you you had to quit working the girls that long -- A. (Interposing) Some

lady from the wage and hour law I guess that's it, some lady came to me and talked to me and Mr. Fisher called me down there to his office, and told me he couldn't work the girls so long, I would have to take the switchboard.

Q. Was that Jess Fisher? A. That is right.

Q. And did he tell you how many hours you would have to work on the switchboard? A. I would have to work from 2:20 -- wait a
24 minute. From 20 minutes to 2, to 20 after 4, every day.

* * * * *

Q. And it was after that time that you began to supervise and help out at the switchboard, is that correct? A. Right.

Q. Now, this apartment that was furnished to you, was there anything different in this apartment than the other apartments in the building? A. It was just the same.

Q. What floor was it on? A. Second.

Q. Can you describe the apartment for us so far as the rooms were concerned, when you came into the front door -- A. (Interposing)
25 When you came in the front door, there was a lobby and that was my office. You went to the left and there was a living room, kitchen and dinette and you went to the right and there was a bedroom and bath.

Q. And a bathroom? A. Yes.

Q. Now, where was the bathroom in relation to the lobby?
A. The bathroom is in the bedroom.

Q. The bathroom was in the bedroom? A. Yes.

Q. Wasn't there a wall partitioning the bathroom from the bedroom? A. Oh yes.

Q. In leaving the lobby, would you go through the bedroom and then go to the bathroom? A. That is right.

Q. As you walked into the bedroom from the lobby, which direction would you go to go to the bathroom? A. I would turn left, wouldn't I? Is that what you mean?

Q. I don't know. A. Yes.

Q. You would leave the lobby, go into the bedroom, turn left.
A. Yes.

Q. And go into the bathroom? A. Yes.

26 Q. Now, I believe you stated that this apartment was furnished to you unfurnished? A. That is right.

Q. And it was your own furniture that you used to furnish the apartment? A. Right.

Q. What about the furniture in the lobby, was that yours?
A. No -- yes it was.

Q. What did it consist of? A. A writing desk and a chair.

Q. Was a telephone there? A. Yes.

Q. Was it on the desk? A. Right.

Q. And the furniture in the bedroom, was that yours? A. All the furniture was mine.

Q. And the furnishings in the bathroom, other than the fixtures were yours, I suppose? A. Well --

Q. (Interposing) What was on the floor in the bedroom? A. Nothing.

Q. What kind of a floor did the bedroom have? A. Wooden floor.

Q. Was it parquet or was it -- A. (Interposing) Parquet.

27 Q. Do you know whether the floor was waxed? A. No, I know that.

Q. Do you know when the last time the floor was waxed? A. When I moved in there, they put wax on.

Q. But it was never waxed after that time? A. No.

Q. Did you take any steps to remove the wax when you moved in?
A. No. It wasn't paste wax, it was liquid wax.

* * * * *

28 Q. All right then, when you woke up on this morning, did you look at that clock? A. Yes.

Q. What time did it say? A. I told you before, it was between 6:00 and 6:30, I'll still say that, about a quarter after six, if you want to be exact.

Q. If you had to be exact, you would say quarter after six?
A. Yes.

Q. Now, did you get out of bed immediately? A. No, I generally lie there for a few minutes, I always do that.

Q. How many minutes do you estimate you laid there this morning? A. Well, five minutes, generally, I usually lie there. There is not too much time when you have to get your breakfast and get dressed.

Q. Is that your estimate of the time you laid there this morning, five minutes? A. Yes.

Q. Then did you get out of bed? A. Yes.

Q. Were you sleeping in pajamas or a nightgown? A. Nightgown.

Q. When you got up, what did you do? A. Exactly what did I do?

Q. Yes. A. I went to the bathroom, I got my underclothes on, all except -- I was all fully dressed except my shoes and my dress, and then I went out in the office.

Q. Let me ask you this, when you first got out of bed, I presume you had your nightgown on? A. Certainly.

Q. Did you put a robe on? A. No.

Q. Did you put house slippers on? A. Yes.

Q. Where were those house slippers? A. Right by my bed.

30 Q. What kind of house slippers were they? A. I should have brought them along.

Q. Can you describe them for us, did they have heels on them? A. No, they were what you call wedgies.

Q. Can you just stick your feet in and they are flat? A. Yes and they have -- no, I can stick my heel in, but they are mostly like a shoe, these were.

Q. Do they have a support or strap that goes up over the heel? A. No, no strap no.

Q. Do you have anything that goes over the heel? A. Over the heel, yes. A piece about that big (indicating.)

THE DEPUTY COMMISSIONER: Indicating about two and a half inches.

BY MR. BECK:

Q. You put those on, just as you stepped out of bed? A. That is right.

Q. Now, how far would you have to go from your bedroom to the bathroom? A. I'm not good at measurements.

THE DEPUTY COMMISSIONER: Approximate the distance. How many steps, that would be perhaps easier for you.

31 THE WITNESS: Well here's my bed and here was the bathroom, like where that door is here, maybe that would be better.

THE DEPUTY COMMISSIONER: She has indicated that the bathroom door is some 6 to 8 feet from her bed, maybe 10 feet.

MR. BOWLES: Would some 10 feet be about the figure?

THE WITNESS: It is about that way, my bed is here and there is my bathroom.

BY MR. BECK:

Q. And so I understand then that you walked into the bathroom and put on your undergarments? A. Yes.

Q. Did you do anything else in the bathroom? A. Washed.

Q. Washed your face? A. That is right and my hands. Combed my hair.

Q. And then what did you do? A. I told you, I put my underwear on.

Q. Anything else? A. And combed my hair.

Q. Anything else? A. Well that's all I do before I eat and call downstairs.

Q. That's all you did on this morning? A. Yes.

Q. Then what did you do after that? A. I ate, and got dressed, -- wait a minute, what did you ask me?

32 Q. You were in the bathroom and you had put on your undergarments and you had washed your face and combed your hair. I asked you, did you do anything else in the bathroom? A. I blacked out, I fell.

Q. In the bathroom? A. In the lobby. Now, I know that when the insurance man was there, in the hospital, I gave a misstatement, but I was half out of my head when he came there.

Q. I have explained certain acts that you did in the bathroom. You put on your undergarments, you washed your face, you combed

your hair. Do I understand you didn't do anything else in the bathroom?

A. Is there anything else to do? I don't know.

Q. If you can answer, please do. If you don't remember, please say so, if you can't answer, you don't have to. A. I went to the bathroom.

Q. All right, did you do anything else? A. No.

Q. All right, then did you leave the bathroom? A. Yes.

Q. Where did you go, what did you do? A. I went in the lobby.

THE DEPUTY COMMISSIONER: For what purpose.

THE WITNESS: To call on the telephone.

33 THE DEPUTY COMMISSIONER: For what purpose?

THE WITNESS: To see if there was anybody down at the switch-board.

BY MR. BECK:

Q. In leaving the bathroom, you walked through the bedroom?

A. Yes.

Q. Did you stop in the bedroom for anything? A. No.

Q. You went directly into the lobby? A. Right.

Q. When you arrived in the lobby, what was the first thing you did? A. Fell.

Q. As you came into the lobby, from the bedroom, where, in relation to the door between those two rooms, did you fall? A. I don't know your name, but there's a girl here, she's a maid and she could tell you exactly where I fell. I don't know.

THE DEPUTY COMMISSIONER: The gentleman who is questioning you, Mrs. Bowman, is Mr. Beck.

THE WITNESS: Thank you.

BY MR. BECK:

Q. Can you answer my question? A. Yes, what did I say.

34 MR. BECK: Read the question back please.

(The Reporter read the following question by Mr. Beck: "Q. As you came into the lobby, from the bedroom, there, in relation to the door between those two rooms, did you fall?")

THE DEPUTY COMMISSIONER: She has answered the question. She doesn't know, Mr. Beck.

MR. BECK: All right.

BY MR. BECK:

Q. Do you know whether you reached the desk in the lobby?

A. Yes I did.

Q. Do you know whether you had picked up the telephone?

A. All I know is the telephone was on the floor when I came to.

Q. Do you have any recollection of picking up the telephone before you fell? A. In a subconscious way, yes, because I knew that was my duties.

Q. Do you have any positive recollection? A. Yes, I do.

Q. Do you have any recollection of speaking into the telephone or hearing anyone speak over the telephone before you fell? A. No.

Q. I understand you were unconscious, is that correct? A. That is right.

35 Q. Now can you tell me this, did you have a sensation of losing consciousness before you fell, or do you believe that you were knocked unconscious as a result of your fall? A. I don't know that.

Q. You have no recollection and are unable to answer that?
A. No.

Q. When you regained consciousness, do you have any idea of how long you were unconscious? A. No.

Q. You are unable to fix any time? A. That is right.

Q. When you regained consciousness, where were you in relation to the desk and the lobby? A. Well, the desk is right in the lobby. I was right by the desk.

* * * * *

36 THE DEPUTY COMMISSIONER: Mrs. Bowman, how far is the desk from the bedroom door?

THE WITNESS: Not far.

THE DEPUTY COMMISSIONER: How many steps?

THE WITNESS: From the bedroom door to the desk, about five steps.

THE DEPUTY COMMISSIONER: In which direction, right or left?

THE WITNESS: Straight ahead.

THE DEPUTY COMMISSIONER: Then it is directly across the lobby from the bedroom door?

THE WITNESS: That is right.

* * * * *

BY MR. BECK:

Q. I may be repeating myself on this question, but when you regained consciousness, where were you lying in relation to that desk?

A. In the lobby, or the office, or whatever you call it.

Q. Were you right in front of the desk? A. Right by the desk.

Q. By the side of the desk? A. That is right.

Q. Which side of it? A. Lefthand.

37 Q. Which side did you usually keep the telephone on? A. Left-hand.

Q. When you regained consciousness, you were unable to get up off the floor? A. That is right.

Q. How long would you estimate you laid there before someone came? A. Well it depends on what time the maid got there. She gets there about 9:00 o'clock.

Q. And what was her name? A. Dora Gay.

Q. Did she knock on your apartment door? A. She has a key, -- no, she don't have no key.

Q. You say she didn't have a key? A. No.

Q. How did she get in? A. I left the door unlocked before I went to bed, she only comes once a week.

* * * * *

38 Q. When you regained consciousness, where was the telephone?
A. Lefthand side of the desk.

Q. Was it on the desk or the floor? A. On the floor.

Q. Was it near you? A. Right by my hand.

Q. Did you attempt to use it to summons help? A. Yes.

Q. Did you call the switchboard? A. I did.

Q. Did you talk to anyone there? A. I did.

Q. Who did you talk to? A. Dorothy, one of the girls.

Q. It was then she came up -- A. (Interposing) She didn't come up, she told me the maid was coming up pretty soon.

Q. But Dorothy -- is there more than one Dorothy? A. No.

Q. Is the maid's name Dorothy? A. Dora.

Q. Did Dora come up shortly or immediately after you talked to Dorothy? A. She did.

Q. Then it was around 8:30 or 9:00 o'clock at that time? A. Yes, about 9:00.

39 Q. After you regained consciousness, how long would you estimate you laid there before you called the switchboard? A. Mr. Beck, I'll have to give a rough answer about that. There was no clock there, I don't know.

Q. Did you lay there -- would you describe it as a long period of time? A. It seemed long to me.

Q. Was it as much as an hour, would you estimate? A. I would say that.

Q. Is there any explanation you can give us why you laid there for so long before calling? A. Except for what the doctor tells me, I was in shock from the fall.

* * * * *

Q. When Dora came in, she helped you into a chair? A. She got me a chair, because she couldn't lift me and then she pulled the chair by the bed and then got me in bed.

Q. And you remained there until you went to the hospital?
A. Right.

* * * * *

40 Q. Now Mrs. Bowman, I am going to let you read what purports to be a written statement which contains a signature of Viola R. Bowman and E. F. Bowman, and ask you if that refreshes your recollection. (Hands witness statement.)

THE WITNESS: You will have to get my glasses, Mr. Bowles, from Mr. Bowman.

(Witness reading statement.)

THE WITNESS: I don't remember this (handing statement to Mr. Beck.).

BY MR. BECK:

41 Q. Does that refresh your recollection, concerning the occurrence of this? A. That there, is wrong.

Q. What specifically? A. That I got out of the apartment.

Q. Do you want to read it? A. Yes.

MR. BOWLES: I would like to have her identify the date and time and what the statement is before any part of it is read into the record.

THE DEPUTY COMMISSIONER: That appears to be two sheets of paper and I assume it contains a written statement in the handwriting of some representative of the insurance carrier who prepared it while talking to Mr. Bowman. Is that what this is?

MR. BECK: Yes sir.

MR. BOWLES: What is the date on it?

MR. BECK: December 7, 1956.

BY MR. BECK:

Q. You say it does not refresh your recollection? A. No, some of it is wrong.

Q. On December 7, 1956, do you recall Mr. Richard G. Freudig interviewing you at the hospital? A. Who is that, no I don't remember him.

Q. Did a man come and identify himself as Mr. Freudig from the insurance carrier? A. Somebody came from the insurance company, I don't know who it was.

42 Q. You don't recall his name? A. No.

Q. At that time did he talk to you about how this accident occurred? A. There was somebody from the insurance company talked to me. That's all I know. I don't remember what he talked about.

Q. Do you recall the time when a man came to see you? A. Yes, it seems I remember --

Q. (Interposing) Did you tell him how the accident occurred?

A. I answered at that time the questions to my ability knew, but I wasn't sure.

Q. Do you recall him writing out a statement and asking you to read it and if it recited the correct version of how this accident occurred, to sign it? A. I remember him writing out, giving me a paper, telling me to sign it, but after all, I was under the influence of a lot of dope.

Q. Is it your testimony that you didn't read it? A. I read it as best I could.

Q. Did you read it? A. Yes.

Q. Did you understand it? A. No.

43 Q. Did you sign it? A. Well, that's my writing isn't it? I would have to look at it.

Q. Is that your signature on the bottom of the front page and on the second page? A. That's my signature.

Q. You signed it without understanding it? A. Yes.

Q. Do you deny telling Mr. Freudig or whoever the man was who came to see you that "I got out of bed on this morning and started into the bathroom. I had on a pair of house slippers and my night clothes, I was on my way to the bathroom, was still in the bedroom when I suddenly slipped and fell heavily to the floor on my right side. I had a terrible pain in my right hip and I could not get up. I do not know why I fell. There was nothing on the floor to cause my fall." A. Mr. Beck, I am too old to lie and if I knew that he had said that in that letter there, I would have said that.

Q. My question was, do you deny saying that? A. Yes, I don't deny saying that, but I don't know.

Q. You have no recollection of saying it, is that your testimony?
A. That is right.

Q. Well, is your testimony today that that is -- A. (Interposing)
44 It is not true.

Q. (continuing) -- that that is an untrue statement I just read?
A. Yes, it is.

Q. How does a switchboard operate when someone in the apartment takes their receiver off the hook, what happens at the switchboard?

A. A light goes on the board and you take a left plug, put it in that hole and ask them "number please", and then they give you a number and then you have to close the key, put in an outside call and then dial.

Q. You say a light comes on first? A. Yes.

Q. Does a buzzer sound? A. No, because we are not too busy to have a buzzer on.

Q. Does it have a buzzer on it? A. Yes.

Q. But you ordinarily didn't use the buzzer? A. I didn't use it because it's an apartment house where there is not too many calls.

45 Q. You don't know about the other operators, do you? A. No.

* * * * *

REDIRECT EXAMINATION

BY MR. BOWLES:

* * * * *

47 Q. When did you begin to check on the telephone girls in the morning? Do you know about when the time was? A. Well, the night-man called me one morning and said that there was nobody there to work, so since then I got up every morning to see.

Q. You checked on it as a part of your duties.

Now, part of your duties all night were to check on -- if somebody called you about the heat or the coal or lights or anything of that sort, was it not a part of your duties to call the maintenance man or janitor to see it was checked? A. Yes.

* * * * *

48 Q. Well, was your mind clear all the time, were you groggy or how would you describe yourself for the period of time when you first went to the hospital? A. Well, let me see.

Q. Would you say you were normal in your thinking and all of your -- A. (Interposing) No, I wasn't normal because the nurse would tell me I would ask such wierd things.

Q. Do you know how long that occurred? A. No, I don't.

Q. Up until after the operation? A. I don't know, I don't remember.

Q. Do you know when the operation took place? A. No, I don't.

* * * *

49

RECROSS EXAMINATION

BY MR. BECK:

* * * *

Q. At the time this man from the insurance carrier came to see you at the hospital and this statement was discussed, was anyone else present? A. My husband, that's all.

Q. Do you know whether your husband was there when the insurance man arrived or whether he came with the insurance man?

A. He came with him, I think.

* * * *

FURTHER REDIRECT EXAMINATION

BY MR. BOWLES:

Q. To the best of your recollection and belief, Mrs. Bowman, what you have told us today about the accident is true, is that correct?

A. It is true.

* * * *

50 THE DEPUTY COMMISSIONER: Mrs. Bowman, was it necessary for you to check on the switchboard every morning?

THE WITNESS: Yes, because the girls never came on time.

* * * *

ELON FRANKLIN BOWMAN

was called as a witness for and on behalf of the claimant, and having been then and there duly sworn by the Deputy Commissioner, assumed the witness stand and upon examination testified as follows:

* * * *

DIRECT EXAMINATION

BY MR. BOWLES:

Q. Mr. Bowman, on the 23rd of November, 1956, where were you living? A. At 1514 Massachusetts Avenue, Northwest -- I mean, 1314 --

51 Q. (Interposing) Massachusetts Avenue, Northwest? A. Yes.

Q. Now, was your wife employed there? A. She was.

Q. What was her employment? A. Resident Manager.

* * * * *

Q. And if you know, what were her duties as resident manager, Mr. Bowman? A. Well, she was on 24 hour call and the usual procedure, we never went to bed until 11:00 o'clock or after, until we knew the nightman was on, and then in the morning, when we get up, we usually got up around 6:00 to 6:15 every morning, and she would go in the bathroom and wash herself up, and change her nightgown and put her petticoat on, go to the hall there where the office was and the telephone and call downstairs and see if everything was all right, and then we would have breakfast. And in the meantime I would be getting breakfast and she would have her breakfast. And if the nightman did have to go off at 7:00 o'clock and if she hadn't had her breakfast, she would go down and take the board

52 until the girls did come. Sometimes the girl was late.

Q. How many days a week were you there? A. Seven.

* * * * *

Q. Now, was there ever any occasions that you recall at any time, that she was called upon to, say after midnight, perform any duties? A. Yes.

* * * * *

53 Q. Mrs. Bowman was subject to be called -- A. (Interposing)
At any hour of the night or day, that is right.

Q. Now, getting back to November 23, 1956, the day Mrs. Bowman was injured, you had been away, is that correct? A. I was up in Virginia at my folks having --

Q. (Interposing) What time did you come home? A. Well I called her the night before and told her.

Q. What time did you come home? A. Around 4:00 o'clock.

54 Q. What did you discover? A. My wife was in bed and I went to touch her and she hollered, see.

Q. What did you do? A. I immediately called the doctor.

Q. And then what occurred? A. And the doctor, the regular doctor wasn't in, so I called the medical building and they give me three names of doctors to call.

Q. And the doctor came over? A. Yes, and he said she undoubtedly had a break there, and to put her in the hospital right away.

Q. And that was on the 23rd of -- A. (Interposing) November.

* * * * *

Q. Now, you visited her of course every day while she was in the hospital? A. Yes sir, I did.

Q. Now, what was the state of her mind or physical condition at the time you visited her at the hospital? A. Well, when she got over to
55 the hospital, she really went to pieces.

Q. What do you mean, describe what you mean? A. Well, she got out of her head, she didn't know what she was talking about, she thought she was back over to the apartment house, she didn't know she was in the hospital, and that went on for quite some time. I don't -- I couldn't swear to what, how many days or even weeks it was, it was at least three weeks she was in pretty bad shape, in shock.

* * * * *

56 THE DEPUTY COMMISSIONER: * * *

Question: Was your wife still in shock at that time as far as you could tell?

THE WITNESS: Well, she wasn't in too good a shape. I told him that before we went over there, that she wasn't in too good a shape.

* * * * *

BY MR. BOWLES:

57 * * * * *

Q. Did I understand you to say you told the insurance man she was not in good shape before you went over? A. I did.

Q. And you did not think she was in good shape when he talked to her? A. That is right.

Q. You weren't present when the accident occurred? A. I was not.

Q. You don't know whether what she told him was right or wrong, do you? A. I do not, no sir.

* * * * *

CROSS EXAMINATION

BY MR. BECK:

* * * * *

58 Q. Let me ask you this. Would you say they were late as much as 50 percent of the time? A. Well, I wouldn't say 50 percent, no.

Q. Would you say 25 percent? A. I would say it occurred probably two or three times a week.

* * * * *

59 Q. All right. Did she tell you where she fell? A. No.

60 * * * * *

Q. Did she tell you how she fell? A. No.

Q. Did you ask her? A. No.

Q. Did you ask her later on at any time? A. The only thing she told me, when she was in the apartment there, that she slipped and fell.

* * * * *

61 Q. Now, subsequent to that time and prior to December 7, 1956, did you discuss with her when she fell, how she fell, where she fell and what she was doing? A. No.

* * * * *

64 A. * * *

Well, when he came back he called me up, himself, and made the appointment to go over there whatever morning it was, I don't remember what day it was, or what the dates were or anything else. But I said it was a good thing you didn't go over last week because she wouldn't have known what you were talking about because she was absolutely in shock and wouldn't know what you was talking about and I said she's not in good shape now. And I don't know if we ought to go now or not.

Q. You did accompany Mr. Freudig to the hospital? A. Yes sir.

Q. Did he pick you up at the apartment? A. Yes sir.

Q. And you drove over to the hospital? A. Yes sir. He also

brought me home.

65 Q. And I suppose you went to Mrs. Bowman's room? A. Yes sir.

Q. And you were present while they talked, were you not?

A. Yes sir.

Q. Were you also present while he wrote out the statement?

A. Yes.

Q. Did you read the statement? A. No.

Q. Did Mrs. Bowman read it? A. No.

Q. Did Mrs. Bowman sign it? A. Yes.

Q. Did you sign the statement? A. Yes.

Q. But I understand neither of you read it? A. I didn't read it.

Q. Did she read it? A. No, because she didn't have her glasses on.

Q. Now, did you -- do you recall her telling Mr. Freudig about how this accident occurred? A. Well I remember the conversation, I couldn't make the exact statements.

66 Q. Do you remember her telling him where she fell? A. No, I don't.

Q. You don't recall? A. No.

Q. Do you recall -- A. (Interposing) The only thing I know, she said she fell in the apartment.

Q. You don't recall her telling him that she fell in the bedroom?

A. Bedroom or bathroom, I don't know, or hall, I don't know.

* * * * *

Q. That is your signature on this statement, is it not? A. Yes sir.

Q. Dated December 7? A. Yes sir.

Q. And do you recall who signed it first, you or Mrs. Bowman?

A. She signed it first, I think, I am not positive.

Q. And you signed after? A. I am positive she did, yes.

Q. But it is your testimony that neither of you read it? A. I didn't read it.

67 Q. And it is your testimony that she did not either? A. To my knowledge she didn't.

* * * * *

HENRY ALLEN BROOKS

a witness called for and on behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and, upon examination, testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. BOWLES:

Q. What is your employment, Mr. Brooks? A. Janitor.

Q. Where? A. 1314 Massachusetts Avenue.

Q. How long have you been at 1314 Massachusetts Avenue?

A. A year the 12th of the month.

Q. That would be May, 1956, May or June? A. June, the 12th of the month will be a year.

* * * * *

69 Q. Whom were you employed by at the apartment? A. Jess Fisher Managing Company.

Q. Was Mrs. Bowman the resident manager of the apartment at 1314 Massachusetts Avenue during the time you were employed there?
A. Yes.

* * * * *

Q. What are your hours of duties there? A. Well, no particular hours, it is just over a 24 hour call.

Q. Do you live at the place? A. Yes.

Q. Do you have an apartment there? A. Yes.

Q. And you are a maintenance man and janitor? Is that correct?

70 A. Yes.

Q. And you are on call 24 hours a day, is that correct? A. That is right.

Q. How many days a week? A. Seven days a week.

Q. Did you ever have any occasion when Mrs. Bowman would call you at late hours in the evening, possibly, to do something? A. I have had occasions of that. One night a pipe broke at 12:00 o'clock at night and they called me for it.

Q. Did you feel free to call on Mrs. Bowman anytime day and night? A. Yes.

Q. Were you instructed to call on her anytime day and night? A. Yes.

Q. She was available for any information or help that you might have needed? A. Yes, she was.

Q. And in turn you were the same way? A. The same way, yes.

Q. Was there any time that you were called while you were working there and Mrs. Bowman was there that she might have worked on the switchboard anytime? A. Yes, she had several occasions of going there, especially sometimes the operator may be late or something like that.

71 Q. That is the morning operator coming to work in the morning? A. Yes, and even at night if the man is late at night, she would take over until he gets there.

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CROSS EXAMINATION

BY MR. BECK:

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Q. Did you learn on that date that Mrs. Bowman had been injured? A. Well, I learned that morning, because in fact nobody didn't know as far as that is concerned until the maid --

Q. (Interposing) When did you learn it? A. The maid went in her apartment that morning.

Q. When did you first learn about it? A. They called me after I finished taking the trash, they called me and told me to come upstairs and help get Mrs. Bowman off the floor and that was 8:30 in the morning.

* * * * *

Q. What did you do when you got there? A. Well, when I got there, why, the maid had put her in bed.

72 Q. And did you talk to Mrs. Bowman? A. Yes, I talked to her.

Q. Did she tell you about her fall? A. No, she didn't. She just said she fell, but she didn't tell me anything about her fall.

Q. Did she tell you where she fell? A. When I went up there, the maid told me where she picked her up at the -- near the front door by her desk, where she picked her up at.

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73

GEORGE T. GRAY, JR.

a witness called for and on behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand, and, upon examination, testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. BOWLES:

* * * * *

Q. During 1956, where were you employed? A. At the Jess Fisher apartment house, 1314 Massachusetts Avenue.

* * * * *

Q. What were your duties there? A. Switchboard operator.

Q. What time, what hours? A. From 11 to 7.

74

Q. Eleven o'clock in the evening until 7 in the morning?

A. Yes.

* * * * *

Q. Did you feel free to call on her anytime during the night when anything went wrong? A. Yes, I did.

Q. Did you ever have occasion to make reports to her at night?

A. Yes, I did.

Q. Did she call you in the morning to check whether the day operator had come in? A. Yes, most every morning.

Q. And if the operator, day operator was not there, did she do anything? A. She came down and relieved me.

Q. And as far as you know, Mrs. Bowman was on duty 24 hours a day there? A. Yes.

* * * * *

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CROSS EXAMINATION

BY MR. BECK:

Q. On the morning of November 23, 1956, were you working as switchboard operator? A. Yes.

Q. What time did you go off duty that morning? A. I believe about quarter to 7 or 7:00 o'clock.

Q. What kind of a switchboard? type of switchboard is this?
A. We have a PBX.

Q. With trunk lines to each of the apartments? A. Yes.

Q. When someone in an apartment picks up their receiver from the telephone, what happens at the switchboard? A. The light comes on.

Q. Is that all? A. Yes, the light comes on and the buzzer buzzes until the plug is plugged into the apartment.

Q. During the time from approximately 6:00 a.m. that morning until you left, did you notice any unusual activity in the switchboard with particular reference to Mrs. Bowman's apartment? A. No sir, I didn't.

Q. Did you notice no light on her trunk line? A. No sir, I didn't get a light from her apartment.

76 Q. Was there anything with reference to the switchboard which might lead you to believe that Mrs. Bowman's phone was off the hook?
A. No sir, not to my knowledge.

Q. Did Mrs. Bowman call you at any time that morning before you left? A. I can't remember. I don't know whether she called me that morning to tell me that -- I don't know, but she has a habit of calling me every morning before I go and telling me is everything all right, or like that and it was probably one of those mornings she'd call because she does call in the morning.

Q. She usually calls you in the morning? A. Yes, and asks me am I all right, and am I going off now and if anybody relieved me yet. Every morning she does that as a habit.

Q. Do you recall specifically whether she called you this morning or not? A. Off hand I would say yes, because it is a known fact for her to do.

77 Q. Would it be unusual for you to leave the switchboard and go off duty without checking with her or her checking with you? A. No, it wouldn't be -- no I never done it. Mostly we always either check with her and tell her we are going or she would come out and let us go if we wanted to.

Q. You never walked out and left the switchboard unattended?

A. No.

Q. Without first checking with her or she called you? A. No.

* * * * *

78

REDIRECT EXAMINATION

BY MR. BOWLES:

Q. On this PBX board, Mr. Gray, wasn't it possible to turn the buzzer off so that only the light would come on? A. Definitely.

Q. And so there might not have been a buzzer buzzing at the time, is that correct? A. That is possible.

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RECROSS EXAMINATION

BY MR. BECK:

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Q. Now, on the switchboard, when the light came on indicating that a phone was off the hook in an apartment, was there any way to turn that light off so long as that phone was off the hook? A. No, unless you plug in and put the plug in and the buzzer would still ring if you don't cut it off.

Q. And there was nothing on the switchboard which would indicate that the phone was off the hook in Mrs. Bowman's apartment?

A. Not at the time I was there.

FURTHER REDIRECT EXAMINATION

BY MR. BOWLES:

Q. If you had plugged the plug in, the light would go off?

A. That is right.

Q. No buzzer would have been buzzing and that might have indicated she was talking on the phone, is that correct? A. That is possible.

If you take that plug and put it in there, you cannot hear the buzzer or nothing else ringing. The plug is plugged up and nothing will ring until she puts that phone back and then it will ring and you know she's through and you pull it out. As long as that phone is off the hook and that plug
 80 is in there, you will get nothing. But the minute you put that phone on the hook, that plug will start ringing and you have to pull it out. If the plug is plugged up and the phone is off the hook, you won't get anything.

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DOROTHY JEAN HARRIS

was called as a witness for and on behalf of the claimant, and having been then and there duly sworn by the Deputy Commissioner, assumed the witness stand and upon examination testified as follows:

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DIRECT EXAMINATION

BY MR. BOWLES:

Q. Where are you employed, Miss Harris -- is it Miss Harris?

A. Yes, 1314 Massachusetts Avenue, Northwest.

Q. How long have you been employed there? A. Five years.

* * * * *

Q. And what are your duties there? A. I am a PBX operator or switchboard operator.

Q. And what are your hours, generally? A. Well, my shift alternates. One week it is from 7:00 to 3:00, between 3:00 and 4:30, and the next week is from 4:30 to 11:00.

Q. And did you take your orders from Mrs. Bowman during the period of time she was resident manager there? A. Yes.

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82

Q. And she was there 24 hours a day? A. Yes.

Q. And did you feel free to call on her at any time you were on duty? A. I did.

Q. Did you ever have occasion to call on her on any of your shifts, for different complaints and so forth? A. Yes.

Q. Any at night time? A. Yes.

Q. Any in the daytime? A. Yes.

Q. Were you on the switchboard, Miss Harris, on the 23rd of November 1956, the date upon which Mrs. Bowman was injured?

A. Yes.

Q. And did you know about the accident, know anything about it?

A. Yes.

Q. Did you go up there after the maid went in and found her?

A. Yes.

Q. And what did you discover when you went into the room?

A. Why, I knew she was in pain, but we didn't know her hip was broken, of course.

83 Q. Where was she? A. Well at that time, the maid had put her in the bed.

Q. Had gotten her into bed? A. Yes.

Q. But you didn't get there while she was still on the floor?

A. No.

Q. When you got there she was in bed? A. That is right.

Q. Do you recall what time you came on duty that morning?

A. Well, it was probably a few minutes past 7:00.

Q. Whenever you might have been late for any reason or what not, did Mrs. Bowman relieve on the switchboard? A. She did.

Q. Did she ever relieve you any time during the day? A. That is right, she did, every time practically, not every day, but it was in the afternoons a lot of time when we went home and she would take over until the next help would come on.

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CROSS EXAMINATION

BY MR. BECK:

Q. Miss Harris, when you came on duty, on this morning, you say it was about 7:10? A. Approximately.

84 Q. Was the night operator there? A. Well, that I don't know --

Q. (Interposing) Mr. Gray, I believe? A. Yes, that's his name. I don't recall. I think he was though. I am not sure now. I don't remember whether he was or not.

Q. Do you recall whether the switchboard was unattended when you arrived? A. Let's see. I know the phone was ringing when I came in. It must have been unattended, because Mrs. Bowman was trying to call me. Evidently the phone had been knocked off the hook or something, I don't know whether she picked it up and she couldn't reach it. If you fall on the floor, she probably couldn't pick it up.

Q. Then when you arrived, the switchboard was buzzing?

A. Yes.

Q. And you checked it and answered it and it was from Mrs. Bowman's apartment? A. Yes, you see it lights under the number, you see, and you can always tell an apartment, when it's ringing by the light under the apartment.

Q. Now, did you answer that? A. Sure I answered every call.

Q. And what did you hear? A. I didn't get an answer at that moment. And then I plugged back after I pulled it out and plugged back
85 and tried to ring again and then the girl told me, the maid was there waiting to go upstairs and she did go up and opened the door.

Q. You plugged in first and you didn't get an answer? A. Yes.

Q. How long did you try to get an answer? A. I don't remember the time, because it was --

Q. (Interposing) Was it as long as a minute? A. Maybe, I don't recall -- I don't really know.

Q. Then you unplugged it? A. Yes.

Q. And then you tried to plug it in again? A. Yes, but I just didn't get an answer, so Dora went up there.

* * * * *

86 Q. And then Dora -- did Dora call you, or what? A. Yes she did. She called me.

Q. Did she call you from Mrs. Bowman's apartment? A. That is right, and she said --

Q. (Interposing) And what did she say? A. She was on the floor in the hallway by the phone. She couldn't get up.

Q. What did you do? A. Well at the moment I didn't know what to do. I was just a little alarmed. I didn't know whether to call the doctor or what. Then when I got a chance I went up there to see what I could find out, whether she wanted me to call the doctor or call the office.

Q. By the time you got there, she was in bed? A. Yes, Dora had put her there.

Q. Would you describe all of this that happened within the hour after you arrived at work? A. Well, as I said before, I wouldn't know any time because I just can't say whether it was an hour, half an hour or two hours. I just don't know.

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87

DORA JANE GAY

was called as a witness for and on behalf of the claimant, and having been then and there duly sworn by the Deputy Commissioner, assumed the witness stand and upon examination testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. BOWLES:

Q. Where are you employed, Miss Gay? A. I work at 1314 Massachusetts Avenue, Northwest.

Q. How long have you been employed there? A. Well, I've been there 21 years.

* * * * *

88

Q. Do you recall the morning of November 23, 1956? A. Yes, I do.

Q. When Mrs. Bowman was injured? A. Yes.

Q. You went up to the apartment. Tell us what you found, in your words, when you went in. What did you do when you got to the door? A. When I got to the door I knocked and Mrs. Bowman said come in, so when I walked in she was laying with her foot toward the door and her head back toward the bedroom, and I said, "What happened?", and she

said, "I fell," and I said, "Well, do you want me to call Dorothy and have her help me pick you up?" She said, "No, she can't leave the switchboard," and I said, "Would you like me to call Brooks?" and she said, "No, I'm not dressed, I wouldn't want him to see me. Would you pick me up?" So I did, I raised her head up, stood her up, and said, "How do you think you can stand," so I turned her loose a little bit and I caught her again and I said, "Well, you can't stand up, you catch me around the neck, hold me and I'll carry you to the bed." So I picked her up and carried her to the bed, about as far as, just a little distance from -- a little distance further from that door, and sit her on the side--

* * * * *

89 Q. Where was she lying, what room was she in when you found her? A. She was in the hall where her desk is, on the floor.

Q. Not in the bedroom or bathroom, but in the hall? A. She was in the hall.

Q. Where her desk was, and with respect to that, was she lying in front of the desk? A. Yes, she was.

Q. In front of the desk? A. Yes.

Q. Where was the phone? A. Right beside her.

Q. On the floor? A. Yes.

Q. Was the hook on the receiver? A. It was up, cocked up, sitting up like this (indicating).

* * * * *

90 Q. What hours did you usually work? A. 9:00 to 4:00, if my work called for that, if I had that much work all day long and if I didn't --

* * * * *

CROSS EXAMINATION

BY MR. BECK:

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91 Q. Well, who asked you or told you -- did anyone ask you or tell you to go up and check? A. She called Dorothy and Dorothy told me she wanted me to come up so I went up.

Q. Were you down in the lobby? A. Yes.

Q. Near the switchboard? A. Yes, I was.

Q. And Dorothy told you she called and asked you to come up?

A. Yes.

Q. Now, when you arrived at her apartment, how did you get in?

A. Well she told me, I knocked and she said "Come in", the door was never locked. She leaves the door so I could come in.

Q. Now, at that time Mrs. Bowman was lying where? A. On the floor, right at the door as you come in. Her foot was almost up to the door and the phone was sitting out, she was lying with her head on her hands like this (indicating) and the phone was sitting right in front of her and her head was toward the bedroom door. Her feet was towards the door that you come into the apartment.

92 THE DEPUTY COMMISSIONER: The witness has indicated that Mrs. Bowman was lying on her face.

THE WITNESS: Yes, she was.

THE DEPUTY COMMISSIONER: With her face propped on her hands.

BY MR. BECK:

Q. And her feet toward the entrance of the apartment? A. That is right.

Q. And her head in which direction? A. Direction of the door of the bedroom.

Q. As you come into the apartment, is the desk over to the right? A. On the right as you come in.

Q. Now, where was the telephone? A. Right down in front of the desk.

Q. Where was it from her head? A. Right in front of the desk, the head, you know like the door you go in the living room, her head was lying between -- like this place here and this is the door to the living room and this is the door to the bedroom, she was lying with her feet back this way and kind of in between those two doors and the phone was by her head.

Q. Do you recall her telling you specifically where she fell?

A. No, she didn't say. She just said she fell. I asked her what was
93 she doing there and she said "I fell."

Q. How was she dressed at that time? A. She had a slip on,
dressed in a slip.

Q. No shoes on? A. She had her bedroom shoes on.

* * * * *

94

VIOLA R. BOWMAN

was recalled by the Respondent, and having been previously sworn,
assumed the witness stand and upon examination testified as follows:

DIRECT EXAMINATION

BY MR. BECK:

* * * * *

95 Q. Now, when you saw Dr. Ferry, did he ask you how this
accident occurred? A. I don't think so, no.

96 Q. You consulted Dr. Ferry on your own, you weren't sent to
him by the insurance company, were you? A. No, I wasn't.

Q. If Dr. Ferry, in his report dated December 17, 1956, in
answer to the query, "State in patient's own words how accident occur-
red", and he answered, "The patient slipped while going to the bath-
room." Would there be any other way of him knowing those facts other
than you telling him? A. I don't know.

Q. You don't know how he got that information? A. No.

* * * * *

RICHARD G. FREUDIG

was called as a witness for and on behalf of the respondents, and having
been then and there duly sworn by the Deputy Commissioner, assumed
the witness stand and upon examination testified as follows:

DIRECT EXAMINATION

BY MR. BECK:

* * * * *

97 Q. Where are you employed? A. I am a Claim's Investigator,
General Accident, Fire and Life Insurance Corporation.

Q. Were you so employed on November 23, 1956? A. Yes sir.

* * * * *

THE DEPUTY COMMISSIONER: The file you are looking at is the file of the insurance carrier in this case?

THE WITNESS: Yes sir.

The first time I saw her I would say, the accident was the 23rd, it was three or four days afterward, at which time I visited her at Doctors Hospital. I was alone. I went in to see Mrs. Bowman and she was
98 in no condition to see me, so I left.

BY MR. BECK:

Q. What do you mean she was in no condition? A. She was in pain and did not recognize me and I just didn't attempt to discuss the accident with her.

Q. All right. A. Well I left there and reported to the office that I couldn't get a statement from her due to her condition. That was on the 28th of November.

Now, her husband, I contacted him, talked to him about it and we set a tentative appointment for December 3 or 4, I'm not sure the exact date. And I told him that we wanted to make an investigation, wanted to find out from her what happened, and told him about my visit and that she wasn't in any condition to talk about it. And he told me that he thought about this time it would be all right. On December 1 my mother passed away and I wasn't in town until after the 4th, and on my return I called Mr. Bowman and he thought that we would be able to visit Mrs. Bowman and secure the statement, which was done on December 7th.

Q. Now, did you go with him? A. Yes, sir.

Q. Did you take Mr. Bowman to the hospital? A. Yes, I picked Mr. Bowman up. We made -- I think I picked him up at 10:00 o'clock in the front of the apartment and we drove over in my car and went up and
99 talked to Mrs. Bowman and secured this statement on December
7.

Q. What was Mrs. Bowman's condition at that time? A. I would say she was quite bright. She recognized me and she smoked a few cigarettes, drank some water.

Q. Was she cooperative? A. Yes sir, fully.

Q. Was Mr. Bowman present all the time you were there?

A. Yes sir.

Q. Now, how did you take this statement? A. Well, I asked her what her duties were, and asked her the usual things in a statement, name and age and so forth, history of what she did there and also how the accident happened.

Q. Did you ask her where it happened? A. Yes sir.

Q. And what did she tell you? A. Well, should I read it from the statement?

Q. No, it isn't necessary. A. She said she was on her way to the bathroom, was still in the bedroom when "I suddenly slipped and fell heavily to the floor on my right side."

Q. Now, on the basis of the information that she gave you, did you set it down in narrative form in the nature of a written statement and submit it to her to read? A. Yes sir.

100 Q. Did she read it? A. Yes sir.

Q. Did she have any questions concerning it? A. No sir, she then, in fact both her and Mr. Bowman read it.

Q. Both of them read it? A. Yes sir.

Q. And did you ask them to sign it? A. Yes sir.

Q. And did they sign it? A. Yes sir.

Q. Is this the statement that you referred to? (Hands statement to witness.) A. Yes sir.

* * * * *

CROSS EXAMINATION

BY MR. BOWLES:

* * * * *

101 Q. What would you say her condition was then at the time you showed it to her? A. I would say she was in good condition, as good as she could be, she had a lot of pain.

Q. That is what I mean. How much pain, how do you know?

A. Well, I could tell by the expression of her face.

Q. Was she winching in the face at the time she made this statement? A. Not all the time.

Q. From time to time? A. Yes sir.

* * * * *

102 Q. Did she read this with eye glasses or without eye glasses?

A. She had her husband give her her eye glasses from her purse.

Q. And she went on and read it and never asked any questions about it? A. No sir.

* * * * *

104

VIOLA R. BOWMAN

was recalled as a witness for and on behalf of herself, and having been previously sworn, assumed the witness stand and further testified as follows:

FURTHER REDIRECT EXAMINATION - continued

BY MR. BOWLES:

Q. Mrs. Bowman, you heard the gentleman testify just now about that statement. Did you read that statement before you signed it?

A. Like I said, I don't remember.

Q. Did you have your eye glasses at the hospital? A. I think I had my glasses at the hospital, yes.

Q. They were at the hospital? A. I think I had them. I most always have them.

Q. You don't recall whether or not you read that statement?

A. What?

Q. You don't recall -- A. (Interposing) Yes, I think I read it.

* * * * *

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RESPONDENT'S EXHIBIT NO. A

Washington, D. C.
December 7, 1956

I, Mrs. Viola R. Bowman, age 64, white American am employed as resident manager at the apartment house; 1314 Mass. Ave. N.W. by Jess Fisher Management Corp.; my salary is \$75.00 per month plus the

apartment I reside in. This is apartment #203 and is a one bedroom apt. I have been employed here since May 1955. My duties consist of renting and showing apartments, supervise the building help. I run the building switchboard 7 days a week 1:45 p.m. to 4:20 p.m., other times I operate the board as the need arises, between help changes etc. I take complaints from the tenants, see that repairs are made. I have all the apartment keys in my apartment and I am on call 24 hours a day to give out keys as well as receive complaints, etc.

On the morning of November 23, 1956, I was alone at the time in my apartment #203. Mr. Bowman was away. I got up at about 6:00 a.m. as usual to get ready to go down to the apartment lobby to see if the switchboard was being covered. The night man leaves the board at 7:00 a.m. and the girl that relieves him is often late and I fill in on the board until she comes. I got out of bed this morning and started into the bathroom. I had on a pair of house slippers and my night clothes; I was on my way to the bathroom, was still in the bedroom when I suddenly slipped and fell heavily to the floor on my right side. I had a
108 terrible pain in my right hip and I could not get up. I do not know why I fell, there was nothing on the floor to cause my fall. I take care of my own apartment. About 8:30 a.m. my maid came in, Dora, and she found me on the floor. She put me into a chair and then she got me back to bed. I laid there in bed until 4:00 p.m. when my husband came home and he called a doctor. I was taken to Doctors Hospital by ambulance and admitted there. Before taking this job, I managed the Park Lane Apts. for 8 yrs., leaving there in 1948. Joseph A. Himes was the bldg. owners. In 1949 I managed Randolph Terrace, 3900 14th Street, N.W. for about 18 months. I did not work again until I took my present job. I do not have any regular doctor. I broke a wrist while working at Randolph Terrace and drew Workmen's Compensation. I also broke my foot on my present job and was also paid compensation.

I have read the above 2 page statement and the facts are true to the best of my knowledge.

/s/ Viola R. Bowman

Witness by:

/s/ E. F. Bowman

RESPONDENT'S EXHIBIT NO. B

DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT
OFFICE OF DEPUTY COMMISSIONER
Washington, D. C.

ATTENDING PHYSICIAN'S REPORT

1. Name of injured person: Mrs. Viola R. Bowman
2. Present address: 1801 Calvert St., N. W., Washington, D. C.
Apt. 43
3. Name of employer: Jess Fisher Management Co. (Robert
Cecilia Invest. Corp.)
4. Date of accident or first illness: Nov. 23, 1956, at 6 M.
5. Dates of treatment rendered by you: 11/24/56 to present time.
6. Other treatments, by whom? Address:
7. Nature of treatment by you? Hip nailing
8. What further treatment indicated: Convalescent care.
9. Who engaged your service? Dr. Manganaro
10. Was injured person hospitalized? Yes Name and address of
hospital: Doctors Hospital
11. State in patient's own words how accident occurred or occupational
disease was caused: The patient slipped and fell going to the
bathroom.
12. Give an accurate and complete description of the nature and ex-
tent of injury (please fill in diagram on back): Intra-capsular
fracture of right hip.
13. Were X rays taken? Yes
14. What do X rays show: Intra-capsular fracture of right hip.
15. Is the claimant's present disability a result of the injury above
described? Yes.
16. Will the injury result in (a) Permanent defect? Undetermined
17. Is there any history or evidence present, of preexisting injury
or disease, and if so, what? No.
18. On what date do you think the injured person will be able to
resume his usual work: Undetermined.
19. On what date able to do any work and nature of work?
20. I am a physician duly licensed in the State of Washington, D. C. and Va.
and graduated in the year 1938 from Johns Hopkins Medical
College.

Dated: December 17, 1956

/s/ Allen M. Ferry, M. D.
AMF of 915 19th St., N. W.
Washington, D. C.

Brief for Appellees

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14255

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
CORPORATION, LTD.,

and

ROBERT CECILIA INVESTMENT CORPORATION, APPELLANTS,

v.

THEODORE BRITTON, Deputy Commissioner, District of
Columbia Compensation District, Bureau of
Employees Compensation,

and

VIOLA R. BOWMAN, APPELLEES.

Appeal from the United States District Court
for the District of Columbia

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Attorneys for Appellee Britton.

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Assistant Solicitor.

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FEB 18 1958

Joseph W. Stewart

CLERK

No. 14255

QUESTION PRESENTED

In the opinion of the appellees the question presented is:

1. Whether the finding of the deputy commissioner to the effect that the employee's injury arose out of and in the course of her employment is supported by substantial evidence in the record considered as a whole.

III

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GENERAL ACCIDENT FIRE AND LIFE ASSURANCE
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ROBERT CECELIA INVESTMENT CORPORATION, APPELLANTS,

v.

THEODORE BRITTON, Deputy Commissioner, District of
Columbia Compensation District, Bureau of
Employees Compensation,

and

VIOLA R. BOWMAN, APPELLEES.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF CASE

This cause arose upon a complaint to review and set aside as not in accordance with law a compensation order filed on June 17, 1957 by Theodore Britton, deputy commissioner, Bureau of Employees' Compensation, United States Department of Labor, in which order the deputy commissioner awarded compensation to Viola R. Bowman

hereinafter called "claimant" or "employee" on account of an injury which the deputy commissioner found arose out of and in the course of employment.

The said order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C. 901 *et seq.*, as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501.

THE COMPENSATION ORDER

In the compensation order complained of, the deputy commissioner found the facts to be in part as follows:

"That on November 23, 1956, the claimant above named was in the employ of the employer above named, whose address is c/o Jesse Fisher and Company, 1420 K Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled 'An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes'; that the liability of the employer for compensation under the said Act was insured by the General Accident Fire and Life Assurance Corporation, Ltd.; that the employment of the claimant by the employer was as resident manager of the employer's apartment house located at 1314 Massachusetts Avenue, Northwest, Washington, D. C.; that the work duties of the claimant in the employment required her to be on twenty-four-hour call seven days a week and included the duty of seeing to it that the apartment telephone switchboard was in operation at all times; that in the performance of the said duty it was necessary for the claimant to see to it that the regular telephone switchboard operators reported for work at stated times and to substitute for the operators who failed to report for work; that the claimant was frequently required to operate the said telephone switchboard due to tardiness and absences of regular operators; that the employer provided an apartment in the said apartment house for the claimant's occupancy so that she would be readily available for the performance of her continuous duties

in the employment; that on the said day the claimant herein, in accordance with the daily requirement of the said duty, arose at approximately 6:30 a.m. and after partially dressing herself started toward the telephone on her desk in the hallway of the apartment she occupied in the said employer's apartment house for the purpose of ascertaining whether or not the regular telephone switchboard operators were properly relieving each other and keeping the switchboard in continuous operation; that as she reached the desk she missed her footing and fell, suffering trauma including intra-capsular fracture of the right hip; that the claimant was performing a regular duty of the employment at the time of the injury; that the injury arose out of and in the course of the employment; that written notice of injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice; that as a result of the injury the claimant required medical and surgical treatment and care and her need for such treatment and care is continuing; that the employer, having knowledge of the injury, neglected to provide the claimant with the necessary treatment and care; that treatment and care required by the claimant as a result of the injury had been rendered by physicians and facilities of her own choice; that the employer and the insurance carrier are liable for the reasonable cost of all treatment and care required by the claimant as a result of the injury; that the average weekly wages of the claimant herein at the time of the injury were \$39.81; that as a result of the injury the claimant has been wholly disabled from November 23, 1956 to the present time and such disability is continuing; that for such temporary total disability the claimant is entitled to compensation at the rate of \$26.54 per week (66-2/3 per cent of \$39.81); that accrued compensation due the claimant for temporary total disability from November 23, 1956 to June 20, 1957, inclusive, 30 weeks at the rate of \$26.54 per week, amounts to \$796.20; that nothing has been paid to the claimant as compensation."

The insurance carrier and the employer brought a proceeding in the court below pursuant to Section 21(b) of the Compensation Law, 33 U.S.C. Section 921(b), to set

aside said order. The court below sustained the order. This appeal followed.

SUMMARY OF ARGUMENT

The deputy commissioner found that the employee's injury arose out of her employment. The finding was supported by evidence on the record considered as a whole. Aside from evidentiary support for the findings made, the applicable law supports the award on three grounds; namely, (a) fact of performance of a work-furthering duty at time of injury, (b) fact of 24-hour duty status, and (c) fact of injury on premises supplied by employer where she had to perform her work. Therefore under the authorities the finding should be accepted on judicial review and the compensation order should be found to be in accordance with law.

ARGUMENT

I

The Evidence of Record Supports the Finding That the the Employee Sustained an Injury Which Arose Out of and in the Course of Her Employment.

A. THE EVIDENCE

At the hearing before the deputy commissioner on June 7, 1957, VIOLA R. BOWMAN, the claimant, testified in part as follows:

That on November 23, 1956 (the date of her injury) she was employed at 1314 Massachusetts Avenue as resident manager (the parties agreeing that she was employed by Robert Cecelia Investment Corporation—(J.A. 10) and had been so employed for about 18 months (T. 9)¹; that her duties required her to be "on call" for 24 hours a day and she lived on the premises in an apart-

¹ T. refers to the typewritten transcript of hearing before the deputy commissioner.

ment (T. 9); that she was on duty 24 hours a day, seven days a week, and was subject to call at any time (J.A. 11); that she was furnished an apartment (in the apartment building) as part of her compensation (J.A. 10); that, when asked what occurred on the above date, she testified as follows:

“Well, I got up, the usual time, between 6:00, 6:30, to get up to see if the switchboard was covered because I have to be on the switchboard in case anybody else isn’t, and the only thing I know is what I always do, I go to the board immediately when I get up and get dressed and see if the board is going to be covered, and I know when I went to the Hospital, I was fully dressed except my shoes and my dress.” (J.A. 11)

That she usually got up between 6:00 and 6:30 and, after going to the bathroom, she partly dresses and goes to the telephone to call the nightman to see if he got notice that the (telephone) girl was coming in (J.A. 11); that if necessary she then goes down and runs the switchboard until the girl gets in or she gets a replacement (J.A. 11); that she was often called by the nightman after midnight to perform the duties of her employment (J.A. 11, 12, 14); that on the morning in question she started to go into her office (the lobby of her apartment) and she guesses that she “blacked out” (J.A. 12); that she went to the telephone and the first thing she knew she was on the floor (J.A. 12); that she was sent to the hospital that evening about 9:00 o’clock by ambulance; that her right hip was injured and she did not strike her head when she fell (J.A. 12, 13); that among her duties is to look after the elevator when it gets stuck (J.A. 14), to evict persons for non-payment of rent, to be called for any emergency night or day (J.A. 14), to work at the switchboard (J.A. 14, 15), to check about the heat, lights (J.A. 25); that on the morning of her accident she went to the bathroom and was fully dressed except for her shoes and her dress when she went out to her office in the lobby of her apartment) (J.A. 17); that she had slippers on—the

type called wedgies (J.A. 17); that she had washed her hands and face, combed her hair and put on her undergarments in the bathroom (J.A. 18); that she left the bathroom and went to the lobby to telephone, where she fell (J.A. 18); [appellants have stated (page 5 of their brief) that claimant "started to the bathroom." It is submitted that the evidence which appellants refer to as supporting their statement (J.A. 16, 17) clearly shows that claimant testified that she had *finished* in the bathroom at the time of injury.] that she went to the lobby to telephone in order to ascertain whether anybody was on the switchboard (J.A. 18, 19); *that she had reached the desk in the lobby when she fell*, the telephone was on the floor when she "came to", and she has a recollection of picking up the telephone before she fell, but has no recollecting of speaking into the telephone or hearing anyone speak before she fell (J.A. 20); that she does not know whether she lost unconsciousness before she fell or was knocked unconscious as the result of her fall; [appellants have interpreted this testimony (page 3 of their brief) as saying that claimant "was unable to state whether she slipped and fell to the floor or whether she lost consciousness and then fell to the floor." A reference to the record (J.A. 20) will show that this interpretation of the double-barreled question and answer is not quite accurate.] that she has no recollection as to how long she was unconscious but when she regained consciousness she was by the desk in the lobby (J.A. 20, 21); that the desk in the lobby is about five steps straight ahead from the bedroom door (J.A. 20); that while she was lying on the floor the maid came in through the unlocked door (J.A. 21) [the maid corroborated this, J.A. 40, 41]; that when she regained consciousness she called the switchboard and Dorothy, the operator, told her the maid was coming up soon (J.A. 21, 22) [this was corroborated by the operator who said that when the phone rang from claimant's room, the maid was waiting to go upstairs and she did go up and open the door (J.A. 38)]; that she remembers somebody from the insurance company interviewing her while

she was in the hospital and writing out a statement for her to sign but she was under the influence of narcotics at the time (J.A. 23); that she read the statement prepared by him as best she could but she did not understand it, although she signed it (J.A. 24); that she does not deny certain statements therein but she has no recollection of making such statements (J.A. 24); that the statement prepared by such representative is untrue and her accident occurred as testified by her (J.A. 24, 25); that she was not normal in her thinking at the hospital—the nurse would tell her about asking about such weird things (J.A. 25); that to the best of her recollection her testimony about her accident is true (J.A. 26); that it was necessary for her “to check on the switchboard every morning” (J.A. 26).

ELON FRANKLIN BOWMAN testified in part as follows:

That on November 23, 1956 he was living at 1314 Massachusetts Avenue where his wife (the claimant) had been employed as resident manager for about 18 months; that as resident manager she was on 24-hour call; that their usual procedure was to get up about 6:00 or 6:15 every morning, his wife would go to the bathroom and partly dress and then go to her office in the hall to telephone “downstairs and see if everything was all right” and if necessary to operate the switchboard (J.A. 27); that they were there seven days a week and lived in an apartment which was furnished as part of his wife’s salary; that on occasions his wife would be called after midnight to perform some duty (J.A. 27); that Mrs. Bowman was subject to call at any hour of the day or night; that he had been away the night before his wife’s accident and returned home about 4:00 P. M. the following day (J.A. 27); that his wife was in bed and he called a doctor who advised hospitalization (J.A. 27, 28); that he visited his wife every day while she was in the hospital and “she really went to pieces” when she got to the hospital (J.A. 28); that (in the words of the witness):

"she got out of her head, she didn't know what she was talking about, she thought she was back over to the apartment house, she didn't know she was in the hospital, and that went on for quite some time. I don't—I couldn't swear to what, how many days or even weeks it was, *it was at least three weeks she was in pretty bad shape, in shock.*" (J.A. 28);

that Mrs. Bowman "wasn't in too good a shape" ("still very sick") when the insurance representative called upon her and he so told the representative before going to the hospital (J.A. 28, 29); that he was not present when Mrs. Bowman's accident happened so that he cannot say whether what she told such representative was right or wrong (J.A. 28, 29).

HENRY ALLEN BROOKS testified in part as follows:

That he is and has been the janitor at 1314 Massachusetts Avenue, where Mrs. Bowman was employed, for about one year (J.A. 31); that Mrs. Bowman was employed as resident manager (J.A. 31); that he worked on a 24-hour call basis as maintenance man and janitor and lived in an apartment at that address (J.A. 31); that on occasions Mrs. Bowman would call him at late hours to perform some service and he had been instructed to call her anytime, day or night, for information or help in connection with his duties (J.A. 31, 32); that on occasions Mrs. Bowman worked on the switchboard when either the morning or night operator was late (J.A. 32); that he first heard of Mrs. Bowman's accident when he was called to "help get Mrs. Bowman off the floor" at 8:30 A.M. (J.A. 32); that the maid put her in bed and told him she had picked up Mrs. Bowman "*near the front door by her desk*" (J.A. 32, 33).

GEORGE T. GRAY, Jr., testified in part as follows:

That in 1956 for nine or ten months he was employed as a switchboard operator at 1314 Massachusetts Avenue, where Mrs. Bowman was resident manager (J.A. 33); that he was so employed from 11 o'clock in the evening until 7:00 in the morning (J.A. 33); that he took his

orders from Mrs. Bowman and he felt free to call on her any time during the night when anything went wrong; that he had occasion to make reports to her at night; that "most every morning" Mrs. Bowman called him to check whether the day operator had come in, and if the operator was not there Mrs. Bowman would relieve him; that as far as he knew Mrs. Bowman was on duty 24 hours a day (J.A. 33, 34); that there is a buzzer on the switchboard but it can be turned off (J.A. 35); if the plug is in on the switchboard and the buzzer is not on, there would be no indication that a receiver is off the hook (J.A. 35, 36).

DOROTHY JEAN HARRIS testified in part as follows:

That she is and has been the switchboard operator at 1314 Massachusetts Avenue for five years (J.A. 36); that she took orders from Mrs. Bowman who lived on the premises in an apartment (J.A. 36); that Mrs. Bowman was there 24 hours a day and she felt free to call on her at any time while on duty; that she had occasion, day and night, to call on Mrs. Bowman relative to complaints and other matters; that she was on the switchboard the morning Mrs. Bowman met with her accident; that she went to her apartment after the maid had gone in and found Mrs. Bowman (J.A. 36, 37); that the maid had put Mrs. Bowman in bed; that whenever she was late Mrs. Bowman relieved on the switchboard and Mrs. Bowman often relieved her in the afternoon until the next shift came (J.A. 37); that when she arrived on the morning of Mrs. Bowman's accident *the switchboard was ringing because Mrs. Bowman was trying to call her* and evidently her telephone had been knocked off the hook "or something", perhaps she "picked it up and could not reach it"; that she answered the call but got no answer "at that moment" (J.A. 37, 38); that she again "plugged in" [later?] but could get no answer "and then the girl told me, the maid was there waiting to go upstairs and she did go up and opened the door" (J.A. 38); that Dora called her from Mrs. Bowman's apartment, *saying that*

Mrs. Bowman was on the floor in the hallway by the telephone and could not get up; that when she got a chance she went up to Mrs. Bowman's apartment and found that Dora had put Mrs. Bowman in bed; that she did not know whether the facts testified to by her happened in a half hour, an hour or two hours (J.A. 38, 39).

DORA JANE GAY testified in part as follows:

That she has been employed as the maid for 21 years at 1314 Massachusetts Avenue (J.A. 39); that she recalls the morning of Mrs. Bowman's accident; that on that morning she went to Mrs. Bowman's apartment, walked in and found Mrs. Bowman on the floor *with her feet toward the door and her head toward the bedroom* (J.A. 39, 40); that she asked Mrs. Bowman what happened and Mrs. Bowman told her that she had fallen; that she inquired whether she should call Dorothy to help pick her up but that Mrs. Bowman replied: "No, she can't leave the switchboard"; that she found that Mrs. Bowman could not stand up so she picked Mrs. Bowman up and carried her to her bed (J.A. 40); that Mrs. Bowman was in the hall where the desk is, on the floor, in front of the desk and the telephone was on the floor beside her, with the receiver "cocked up" (J.A. 40, 41); that Mrs. Bowman had called Dorothy, the operator, and told her she wanted me to go up; that she was down in the lobby near the switchboard at the time (J.A. 40); that Mrs. Bowman usually leaves the door unlocked for her to come in (J.A. 41); that when she found Mrs. Bowman on the floor the latter was dressed in a slip and had bedroom shoes on (J.A. 42).

The insurance carrier offered in evidence a statement made by claimant to an insurance investigator at the hospital on December 7, 1956 which was two weeks after the accident; the investigator stated that he first went to the hospital for a statement on November 28, 1956 but that her condition was such that she was in pain and did not recognize him (J.A. 43); that when he returned on

December 7, 1956 she had lots of pain which "made her wince" but "not all the time". (J.A. 45).

Claimant testified that the statement [about her being on her way to the bathroom] is not correct and that she was under the influence of narcotics and in pain at the time of the statement (J.A. 23 to 25).

B. SUMMARY OF EVIDENCE

The evidence shows that Mrs. Bowman lived on the premises of the employer as part of her job as resident manager. It also shows that she was available for, and did perform, services at all hours of the day and night; she was "on call" 24 hours a day, seven days a week. Her first duty upon awakening each morning was to check whether the switchboard was being attended and, as was her custom, she got out of bed for the purpose of ascertaining such fact. Mrs. Bowman's testimony further shows that on the morning of her accident, *after* having gone to the bathroom, she was on her way to the telephone to call the switchboard operator for such purpose when she fell—in the hallway office at the desk upon which the telephone rested. (The place where she was found (at the telephone) was corroborated by the maid and the switchboard operator.)

II

The Applicable Law Supports the Award.

1. General Standard of Review.

The scope of judicial review is set forth in *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, wherein the Supreme Court on page 508 said:

* * * The standard, therefore, is that discussed in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456. It is sufficiently described by saying that *the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.* * * *

* * * * *

* * * *We do not mean that the evidence compelled this inference; we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. We hold only that on this record the decision of the District Court that the award should not be set aside should be sustained. (Emphasis supplied.)*

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: *Wilson & Co., Inc. v. Locke*, 50 F.2d 81 (C.A. 2, 1931); *U. S. Fidelity & Guaranty Co. v. Britton*, 88 U.S. App. D.C. 293, 188 F. 2d 674 (1951); *Naida v. Russell Mining Co.*, 159 Pa. Super. 155, 48 A.2d 16 (1946); *Griffin's Case*, 315 Mass. 71, 51 N.E.2d 768 (1944); *Pittsburgh Plate Glass Co. v. Morgeson*, 198 Okla. 215, 177 P.2d 115 (1947); *Lockheed Aircraft v. Industrial Accident Commission*, 28 Cal.2d 756, 172 P.2d 1 (1946); *Square D Co. v. O'Neal*, 117 Ind. App. 92, 66 N.E.2d 898 (1946).

2. The Injury Was Compensable Under Three Principles of Workmen's Compensation Law.

The only issue raised before the deputy commissioner as shown by the transcript of testimony (page 3) is whether the employee suffered "an accidental injury arising out of and in the course of her employment." This brief proposes to show that, under the findings of fact contained in the compensation order complained of, there are three coordinate and equally cogent legal grounds which support the award of benefits under the compensation law. They are:

A. That at the time of the injury the employee was performing a particular duty in connection with her employment as stated in the findings of fact; namely, checking to see whether the apartment telephone switchboard was being manned and whether the morning operator had come on the job as required.

B. That the exigencies of this employee's duties as found by the deputy commissioner "required her to be on 24-hour call seven days a week" with various duties to perform throughout the period, a fact which placed her in a constant *waiting-duty-status*.

C. That the deputy commissioner found that the employer furnished her with living quarters for her occupancy "so that she would be readily available for the performance of her continuous duties in the employment," thus making applicable in her case the familiar workmen's compensation principle commonly referred to as "The bunkhouse rule".

Each of these separate and equally cogent grounds in support of the award will be discussed below:

A. *Performance of Specific Duty*

The employee at the time of injury was directly performing a work-furthering duty. According to the findings, as supported by the evidence above narrated, the injury to the employee occurred at a time when she was seeing to it that the regular switchboard operator had reported for work and in ascertaining whether it would be necessary for her to take over this specific function should she find the operator not present. She was directly attending to this duty when she started toward the telephone as found by the deputy commissioner, which was located on a desk which she kept in the hallway of her apartment, a portion of the living premises used as her *office*. According to the findings as supported by evidence, as she reached the desk she missed her footing, fell and suffered the compensable injury found by the deputy commissioner. There is no need to cite cases to support the proposition that where an employee is injured while performing a regular duty, particularly in the actual work effort, such injury is a compensable one.

B. *In waiting-duty-status*

Legal reasons in support of the award in this case overlap by virtue of the fact that the circumstances of

the employment location and activities of the employee combine to bring into play more than one principle of workmen's compensation to support the award. We find in the compensation order a carefully detailed account of the employee's duties and of her duty in particular "to be on 24-hour call seven days a week," including a recitation of manifold duties expected of her during her waiting period.

If we regard the employee as in a general status of "waiting" (which she was *in addition to* performing the particular duty on the morning in question) the case falls squarely into the familiar pattern of an injury to an employee while waiting and holding himself available to perform his master's service.

It is important at this juncture to call the Court's attention to the fact that the appellants did not, before the deputy commissioner, deny the fact that the employee remained subject to call on a 24-hour duty basis; moreover, the appellants did not challenge the deputy commissioner's finding on this point when they filed the complaint below. The appellants therefore stand before this Court as not contesting the correctness of the findings in so far as they relate to the employee's being subject to 24-hour duty call. The appellants therefore cannot avoid the fixation of legal liability upon the employer and carrier in this case arising from an injury which occurred during an on-call or waiting period. For a typical case see *Robinson v. Levy*, 20 N.J.M. 465, 28 A.2d 651 (1942), where a child's nurse subject to 24-hour duty was injured while washing her car at her own home during a four-hour rest period. The injury was held compensable because of her status as one remaining at the employer's service in waiting. A similar nurse case involving an injury while cycling for recreation during a waiting period was held compensable: *Clapham v. Davis*, 232 App. Div. 458, 251 N.Y.S. 245 (1931).

The waiting does not have to occur either in the employer's "bunkhouse" or in his factory or at any other workplace. It is not the particular work *premises or lo-*

cation which create the conditions for coverages of such injuries, but the fact of duty status during the time interval. In *Penn Stevedoring Co. v. Cardillo*, 72 F.Supp. 991, the workman under the Longshoremen's and Harbor Workers' Compensation Act had discharged his duty for the moment and was obliged to wait before he could resume work. During the waiting period he wandered about some floats moored at a dock, watching some bales being unloaded and there fell into the water while crossing from one float to another. Compensation was awarded for this "waiting time" injury.

There are also many cases involving domestic servants who are subject to 24-hour duty. Many cases involved unexplained falls by these "on call" servants who are required to be available at any time of the day or night, with no evidence required that any employment condition may have contributed to the falls. *Larson's "Workmen's Compensation Law"* cites many such cases in Volume I, Section 24.21. Several leading cases of the duty or waiting status kind are *Martin v. Plaut*, 293 N.Y. 617, 59 N.E. 2d 429 (1944); *Employers' Liability Assurance Corp. v. Industrial Accident Commission*, 37 Cal. App.2d 567, 99 P.2d 1089 (1940). A particularly interesting case when considered in the light of the present case is that of a hotel cook who fell on her way to the bathroom early in the morning before commencing work: *Underhill v. Keener*, 258 N.Y. 543, 180 N.E. 325 (1931). Accord: *Bruyere v. Walker*, 7 N.J.Misc. 116 (bath case); *Tinnelly v. Schrumppf*, 278 App. Div. 993, 106 N.Y.S.2d 71 (1951); *Doyle's Case*, 256 Mass. 290, 152 N.E. 340 (1926); *Carraway Methodist Hospital v. Pitts*, 256 Ala. 665, 57 So.2d 96 (1952); *Wood v. Kings Park State Hospital*, 41 N.Y.S.2d 391 (1943) (award to hospital clerk who fell from a chair while dressing after a bath); *Brandner v. Myers Funeral Home*, 330 Mich. 392, 47 N.W.2d 658 (1951) (receptionist at funeral parlor, living on premises at employer's request, slipped while leaving bathtub to answer telephone); *Weiss v. Friedman's Hotel*, 176 Pa. Super. 98, 106 A.2d 867 (1954) (cook injured taking

shower). *Larson* cites the *Scott* case (cited post) decided in this jurisdiction, and many, many other cases which are completely indistinguishable in their essential features from the present one.

C. Subject to Bunkhouse Rule

The so-called "bunkhouse rule" is about as old as the beginning of workmen's compensation law itself. Its name has its origin in the older cases such as those arising in the lumbering industry where bunkhouses were furnished to employees working in the forests. Stated simply, the bunkhouse rule is a doctrine which holds injuries to be compensable where an employer requires an employee to live on the premises either by reason of the contract of employment or because of the nature of the duties which the employee performs.

In relation to the application of this rule we find appropriate findings in the compensation order, supported by the evidence above narrated, to the effect that the employer provided an apartment in his building for the employee's occupancy "so that she would be readily available for the performance of her continuous duties in the employment." Moreover, the order recites required duties which could be performed only by a person in continuous residence, so that it is inescapable that the nature of her employment required her to live where she did as she could otherwise not have performed the duties for which she was paid.

We find the record made before the deputy commissioner completely silent in respect to any objection by appellants or any assertion by them that this is not a case involving the bunkhouse rule. We find the complaint below completely silent in respect to the deputy commissioner's findings, above alluded to, which find the fact of living on the premises and the requirement of that kind of living as imposed by the employment itself. The appellants by their silence necessarily concede the correctness of the facts as found, and as well the legal con-

clusions and liability flowing from the facts. The law is that an injury occurring on or in premises which the employee is thus required to occupy is compensable as arising out of and in the course of the employment where the injury occurred in the reasonable use of the premises. Under the facts as found in the present case there is not the slightest hint that the injury occurred otherwise than in the reasonable and proper use of the premises.

The leading case in this jurisdiction, *Scott v. Hoage*, 63 App. D.C. 381, 73 F.2d 114, which is a typical case to which the bunkhouse rule is applicable. In that case the deceased was a janitor who was required to sleep in the apartment house of his employer. The premises caught on fire and the employee was destroyed. His death was held to be compensable. The appellants in the present case seek to distinguish the *Scott* case from the present case, but appellants' basis for distinction ignores the reason for the rule providing coverage. Briefly summarized, appellants say that the *Scott* case does not apply because of the *nature of the cause of the harm* in that case; namely, fire. It would be a strange rule indeed for cases to rise or fall depending on the identification of the *harmful* agent which brings about injury or death. These cases are not determined by an appraisal of the nature of the causal agent, but whether the resulting injury or death took place in the reasonable use of the premises. It would be illogical indeed to argue that fire is to be a recognized causal agent but a hard floor is not. *Schneider* in his monumental treatise on workmen's compensation ("Workmen's Compensation Law," Volume VII, page 84) states the rule which appellants apparently do not recognize, and which is quoted from section 1631 of that source as follows:

"The general rule is, if an employee is required to live or board on the premises of his employer, either by the terms of his contract of employment or by the necessity of the work, *an injury received*

while making reasonable use of the premises may be compensable, though the employee is not at work at the time of the injury." (Emphasis supplied)

This statement of the law is followed by a large array of supporting cases from many jurisdictions including a considerable number from England, where the rule apparently was first invoked. It is termed in this work the "bunkhouse rule".

In the present case we can even go one step further within the scope of this legal reason supporting the award. It might be that in many cases the bunkhouse furnished by the employer is not at the same time the "industrial premises" or work place. But where in addition to the fact of furnishing the quarters it so happens that *the quarters themselves* are the place *where work is performed*, a *fortiori* injuries in the quarters are compensable. We have in the present case the circumstance that the apartment occupied by the employee was not only a place to live, but it was also *her work office*. The employee maintained her office in the hallway of her apartment, and in it was a desk from which she transacted business. This made the premises not only a place of residence, but also *the industrial premises* of this employer.

This court has repeatedly held that injuries *on the industrial premises* are presumed to arise out of the employment. See *Smoot Sand & Gravel Co. v. Britton*, 80 U.S. App. D.C. 260, 152 F.2d 17; *Travelers Insurance Co. v. Cardillo*, 78 U.S. App. D.C. 255, 140 F.2d 10. Moreover, the appellants have the statutory presumption to reckon with in Section 20(a) of the Act (33 U.S.C. 920(a)) to the effect that in any proceeding for the enforcement of a claim for compensation it shall be presumed in the absence of substantial evidence to the contrary that the claim comes within the Act. And this court held specifically in *Robinson v. Bradshaw*, 92 U.S. App. D. C. 216, 206 F.2d 435 (1953) that an injury in the course of employment "must be presumed to have arisen therefrom." See also in this same general vein *General Accident Fire*

& Life Assurance Corp. v. Donovan, No. 14022 in this Court decided January 16, 1958; *Phoenix Indemnity Co. v. Willard*, 130 F.Supp. 657 (N.Y. 1955); *Travelers Insurance Co. v. Donovan*, 95 U.S.App. D.C 331, 221 F.2d 886 (1955).

III

Appellants' Argument.

The appellants spend most of their brief in an attempt to argue a matter which in appellees' opinion is wholly immaterial. This is whether the employee was injured either walking to or from the bathroom, or walking to the telephone to perform the duties described in the findings. Under any view of the law as applicable in any of the three categories above outlined, it is wholly immaterial whether or not the fall occurred while going to or from the bathroom. In the first place appellants must assume something contrary to established fact. The finding of the deputy commissioner upon the fact, namely, that her fall occurred while going to her telephone at her desk to call the switchboard is not only amply supported by the evidence both direct, indirect and circumstantial, but is the only finding which reasonably could have been made from the evidence.

The appellants' plea that the court should send the case back to the deputy commissioner, to inquire further in respect to the place of the fall, overlooks the fact that there is a very definite rule of law which must be followed and which governs the scope of review by this Court. This Court has repeatedly stated the rule in so many cases as to make it entirely unmistakable. The rule is given in the *O'Leary* case cited in the first part of this brief. This Court consistent with the rule has stated that it will not re-weigh the evidence before the deputy commissioner to see whether it could or would arrive at a different conclusion on the facts. The appellants' request in terms of scope of review is simply that the court should accept what appellants believe to be the weight

of the evidence upon the point concerned with the actions of the employee on the morning of her injury. This request obviously is for a kind of review not authorized by law.

It will be shown below that even if the employee had gone to or from the bathroom it could not change the result under any one of the three legal grounds supporting the award. It is a well-recognized principle of workmen's compensation law that the use of lavatories, toilet facilities, baths, and facilities for changing of clothing (all of which are lumped under the heading "*personal comfort or convenience activities*") when performed in relation to a work activity or a place of work or a place to which the "bunkhouse rule" applies does not take an employee out of the course of his employment and injury in any such activity arises out of employment. As *Larson* states the rule in his work above cited (volume I, Section 21.00)

"Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment."

Accordingly, if under the first ground for coverage in the present case, namely, activities directly connected with the forwarding of the work of the employer, this employee had gone to the bathroom for any reasonable purpose, that personal comfort or convenience act would not take her out of the protection of the Act any more than would the going to a toilet by a factory employee on a factory premises remove the factory employee from such protection.

Under the second ground for coverage, employees in a waiting status and subject to call are of course in no different employment status from employees engaged in

the actual performance of work, insofar as the use of the bathroom facilities are concerned. The "personal convenience act" rule is not confined to factory workers.

On the application of the third ground for coverage, or the "bunkhouse rule", there are of course many cases involving injuries while using bathroom facilities which were held to be compensable. A typical compensable case involving bathing is the following: A hotel dishwasher, off duty but on call, who was injured while taking a shower was held entitled to compensation for his injury; *Taylor v. 110 S. Penn. Ave. Corp.*, 117 N.J.L. 346, 188 A. 689 (1936). In *Madigan v. United Hospital*, 274 App. Div. 1077, 85 N.Y.S.2d 475 (1949) (appeal den. 85 N.E. 795), an award was sustained with the following terse opinion:

"Deceased was employed as a porter in a hospital. As part of his compensation he was furnished room, board and laundry. He fell in the bathroom at the building of his employer where he roomed. Death resulted. Award unanimously affirmed."

The Court in the present case, however, has no need to concern itself with the rule of law applied in the above cited cases applicable to injuries occurring while the employee is using bathroom facilities or otherwise engaged in a personal comfort or convenience act. By giving effect to the scope of review as outlined by the Supreme Court in the *O'Leary* case, above cited, in conjunction with the evidence which supports the finding of the deputy commissioner, the present case will be found to involve no possible additional factor such as an injury using bathroom facilities or involving a personal convenience activity. This feature of possible use of bathroom facilities and the effect thereof upon her right to workmen's compensation benefits appears to have been the only point urged by appellants.

IV

Appellants' Request to Remand Case.

At page 10 of their brief, appellants state that at the time of the hearing below when the court was performing judicial review of the administrative action, the appellants subpoenaed certain records and that counsel for appellants stated to the court what he expected such records to show if he could introduce them. Appellants recite the trial court's refusal to consider this offer of evidence. Appellants now ask this Court to remand the case to the deputy commissioner for further proceedings to "determine if there is, in fact, any reason for refusing to consider the written statement and medical report in arriving at his findings."

It was entirely proper for the court below to refuse to consider evidence *de hors* the record. It was entirely improper for the plaintiffs below to ask for judicial review of a compensation order which was based on an existing record and evidence, and then to propose that the court consider evidence outside the administrative record. The court under the statute (33 U.S.C. § 921(b)) was obliged to determine upon judicial review whether the administrative action was or was not in accordance with law, and of course was perforce limited to the allegations of the complaint, all of which pertained to the irrelevant and immaterial conclusions of plaintiff that the employee had been injured while proceeding to the bathroom. As the action of the trial court was obviously proper, the request in the appellants' brief that the case be returned to the deputy commissioner is not only out of order as no premise for it appears in the complaint, but it would be improper to permit a party to the administrative proceedings to adduce further evidence after termination of the proceedings, which was equally available to this party at the time of the hearing and prior thereto. The prayer below (J.A. 3) was that the court "wholly suspend or set aside said award and dismiss the claim for compensation", not that the case be returned to the deputy commissioner.

CONCLUSION

In view of the fact (a) that it is apparent from the testimony and other evidence in the official transcript of testimony that all material findings of fact of the deputy commissioner are supported by the evidence; (b) that the award in the present case is supportable upon three separate but coordinate legal grounds, and (c) that no error of law appears from the transcript of testimony, the compensation order or the action of the court below, it is respectfully submitted that the compensation order complained of is in accordance with law and that the judgment below sustaining it was proper and should be affirmed. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469.

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